

STATE OF MICHIGAN
IN THE SUPREME COURT

CLAM LAKE TOWNSHIP, a Michigan
municipal corporation; and HARING
CHARTER TOWNSHIP, a Michigan
municipal corporation,

Appellants.

Supreme Court Docket No. 151800

Court of Appeals Docket No. 325350

Wexford County Circuit Court Case No. 14-
25391-AA

State Boundary Commission Docket No. 13-
AP-2

v

STATE BOUNDARY COMMISSION, an
administrative agency with the Michigan
Department of Licensing and Regulatory
Affairs; TERIDEE LLC, a Michigan limited
liability company; and CITY OF CADILLAC,
a Michigan home rule city,

Appellees.

**APPELLEE TERIDEE LLC'S RESPONSE
IN OPPOSITION TO APPELLANTS'
APPLICATION FOR LEAVE TO APPEAL**

Ronald M. Redick (P61122)
MIKA MEYERS BECKETT & JONES PLC
Attorneys for Appellants
900 Monroe Avenue, NW
Grand Rapids, MI 49503
(616) 632-8000

Randall W. Kraker (P27776)
Brion B. Doyle (P67870)
VARNUM LLP
Attorneys for TeriDee LLC
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

Patrick M. Fitzgerald (P69964)
George Elworth (P23979)
MICHIGAN DEPARTMENT OF ATTORNEY
GENERAL
Attorneys for State Boundary Commission
P.O. Box 30754
Lansing, MI 48909
(517) 373-1162

Michael D. Homier (P60318)
FOSTER SWIFT COLLINS & SMITH PC
Attorneys for City of Cadillac
1700 East Beltline Avenue, NE, Suite 200
Grand Rapids, MI 49525
(616) 726-2200

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COUNTER-STATEMENT OF BASIS OF JURISDICTION

Appellants' Application arises from the Circuit Court's December 9, 2014, Opinion on Appeal affirming the State Boundary Commission's June 11, 2014, Summary of Proceedings, Findings of Fact, and Conclusions of Law, a decision that became final by Order of the Director of the Department of Licensing and Regulatory Affairs, which was entered on June 26, 2014. Appellants filed an application for leave to appeal with the Court of Appeals pursuant to MCR 7.203(B)(3), which the Court of Appeals denied "for lack of merit in the grounds presented."

Applications for leave to appeal to the Supreme Court are required, under MCR 7.302(B) and the circumstances presented here, to show either that (1) the issue preserved for appeal involves legal principles of major significance to the State's jurisprudence; (2) the issue preserved for appeal has significant public interest; or (3) the decision of the Court of Appeals is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

Appellants cannot demonstrate any of these requisite grounds. Therefore, the Application should be denied.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Should this Court overturn the Michigan Court of Appeals' decision in *Casco Township v State Boundary Commission*, 243 Mich App 392; 622 NW2d 332 (2000), which held that the State Boundary Commission has the jurisdiction and authority to decide the validity of an Act 425 agreement, when (1) there is a presumption in favor of upholding precedent and Appellants have failed to demonstrate "compelling justification" for overturning *Casco Township v State Boundary Commission*, 465 Mich 855; 632 NW2d 145 (2001); and (2) this Court, in *Casco Township*, previously declined to consider an application for leave to appeal from the Court of Appeals' decision in *Casco Township*?

The State Boundary Commission answers: No.
The Circuit Court would answer: No.

The Court of Appeals denied Appellants' application for leave to appeal "for lack of merit in the grounds presented."

Appellees answer: No.
Appellants answer: Yes.

2. Was there competent, material, and substantial evidence to support the State Boundary Commission's determination that Appellants' Act 425 Agreement is invalid because it was entered into in order to avoid annexation?

The State Boundary Commission answered: Yes.
The Circuit Court answered: Yes.

The Court of Appeals denied Appellants' application for leave to appeal "for lack of merit in the grounds presented."

Appellees answer: Yes.
Appellants answer: No.

3. Did the Circuit Court correctly hold that the doctrine of collateral estoppel does not apply to the State Boundary Commission's decision based on the fact that (1) Appellants waived the argument by failing to raise it before the State Boundary Commission; (2) the

legislature did not intend for State Boundary Commission decisions denying annexation petitions to be final; (3) the State Boundary Commission's decision-making process with respect to annexation is not adjudicatory in nature; and (4) there was a change in circumstances between the first and second State Boundary Commission adjudications, such that the ultimate issue considered was not identical?

The State Boundary Commission answered: Yes.

The Circuit Court answered: Yes.

The Court of Appeals denied Appellants' application for leave to appeal
"for lack of merit in the grounds presented."

Appellees answer: Yes.

Appellants answer: No.

The [State Boundary Commission] has the statutory power to adjudicate [Appellee Teridee LLC's] annexation petition. . . . Determination of the validity of an Act 425 Agreement is a necessary step in the SBC's annexation proceedings, as the SBC has already decided in this case. The SBC frequently hears testimony and other evidence regarding Act 425 agreements, and has already done so in this case. The SBC is not only capable of determining the validity of Act 425 agreements, but is uniquely suited to do so, since such determinations must be made in every annexation case involving an Act 425 agreement.

Appellants' September 10, 2013, Br Support Mot Summ Disp at 13, *TeriDee LLC, et al v Clam Lake Twp, et al*, Wexford County Circuit Court Case No. 13-24803-CH (citations omitted)(emphasis added), **Tab 1.**

INTRODUCTION AND COUNTERSTATEMENT REGARDING GROUNDS FOR GRANTING LEAVE TO APPEAL

It was plainly evident to two separate tribunals, the State Boundary Commission ("SBC") and the Circuit Court, that Appellants Clam Lake and Haring Charter Townships' (the "Townships") Act 425 Agreement was a sham contract, an illusory agreement that the Townships entered into solely in an attempt to thwart annexation.¹ Likewise, the Court of Appeals found no validity in the Townships' protestations of the decisions below, as it denied the Townships' application for leave to appeal "for lack of merit in the grounds presented."

Leave to appeal should not be granted in this case because the Townships seek nothing more than a third appeal and a fourth bite at the apple before a new audience. The questions presented in the Townships' Application most certainly do not involve novel issues or unsettled areas of the law. Rather, the issues presented represent nothing more than dissatisfaction with the Circuit Court's findings on well-settled principles of Michigan law.

¹ As the Townships also correctly note, their Act 425 Agreement has been invalidated in two separate Circuit Court proceedings for two different reasons. In a separate lawsuit from the proceedings below, the Circuit Court granted Appellee TeriDee LLC's ("TeriDee") motion for summary disposition on its request for a declaratory judgment. In its September 19, 2014, Opinion and Order the Circuit Court held that the Townships' Act 425 Agreement was void because it unlawfully restricted and delegated Haring Township's legislative authority. The Townships filed an appeal as of right from that decision on October 7, 2014. See *TeriDee LLC, et al v Clam Lake Twp, et al*, Court of Appeals Dkt #324022.

The Townships argue in their Application that the SBC exceeded its authority in making the factual determination that the Townships' Act 425 Agreement was invalid because it was designed to thwart annexation. This argument is contrary to the single binding precedent that is directly on point: the Court of Appeals' decision in *Casco Township*, which is why the Townships' argument has been rejected at every level of review. Thus, in order for the Townships to prevail, this Court would need to overturn *Casco Township*, which is what Appellants now seek.

No longer content to merely characterize the *Casco Township* decision as dicta, and because their other arguments have been rejected time and time again, the Townships audition a new theory for the first time in their Application to this Court, arguing that the *Casco Township* decision should be overturned and thrown out altogether. In 2001 this Court previously refused to consider an application for leave to appeal from the *Casco Township* decision, and there has been no intervening change in the law that would warrant a different decision now. Moreover, the reasoning and analysis in *Casco Township*, which relies on multiple decisions of this Court, remain sound. Indeed, as the Townships themselves have argued, the SBC is "uniquely suited" to determine the validity of an Act 425 agreement and "must" necessarily do so in every annexation case involving an Act 425 agreement, which is one of the reasons why *Casco Township* was properly decided.

The Townships also argue in their Application that the Circuit Court erred in holding that the Townships did not properly raise the doctrine of collateral estoppel in the proceedings before the SBC and that, in any event, the doctrine did not apply to the SBC's decision in this case. The question of whether the doctrine of collateral estoppel applies to an administrative decision is

governed by a familiar test that this Court and the Court of Appeals have applied for decades. The circuit court correctly held that the test was not satisfied in this case for multiple reasons.

Finally, it is also worth noting that it has become increasingly rare for appellate courts to hear appeals from SBC decisions, especially once the law was changed so that parties could no longer appeal as of right. It appears that the Court of Appeals has only twice granted leave since that time (and in the last twenty years), and one of those decisions is the *Casco Township* case, which was fatal to the Townships' appeal below. Given the highly deferential standard of review that appellate courts apply to SBC's findings, it is not surprising that few appeals are heard. There is certainly nothing exceptional about this case that would warrant a departure from this trend.

For all of these reasons, the Townships' Application for Leave to Appeal should be denied.

COUNTER-STATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND

A. Overview of the Annexed Property and the Proposed Development

For more than six years, TeriDee has been trying to develop its property at the interchange of M-55 and US-131. As TeriDee has described in various media and in its annexation petition, it seeks to develop a first-class, professionally landscaped development that would have a single boulevard entrance, 90 percent of the development set back over 175 yards from M-55, and include 15 to 20 acres of undeveloped property acting as a buffer from the abutting property to the east. Record of Proceedings ("ROP"), Tab 7B. The Townships vigorously oppose any such development and have attempted to block it at every turn, including by entering into two separate sham Act 425 agreements, the most recent of which was the subject of the appeal below (the "Act 425 Agreement").

The annexed area is approximately 241 acres in size. ROP, Tab 7B. TeriDee owns approximately 141 acres of vacant land (the "Property"), which equates to over 95 percent of the private property in the annexed area, as the vast majority of the remaining acreage is public property.² *Id.* The Property is located near the intersection of M-55 and US-131. ROP, Tab 4B. TeriDee intends to develop the Property into a mixed-use development that would include retail stores, a hotel, a restaurant, and other commercial entities. ROP, Tab 7B. It has been estimated that this project would create between 850 and 1,000 jobs. *Id.*; ROP, Tab 7A. The proposed investment for the developed Property has been estimated to be at least \$40,000,000. ROP, Tab 7B.

TeriDee sought annexation of the Property into the City of Cadillac in order to gain access to the City's water and sewer services, as the proposed development cannot occur without connection to these public services. ROP, Tab 4B. The City of Cadillac has water and sanitary sewer services within one-quarter mile from the proposed annexation area, and the City of Cadillac is able to provide the necessary public services as soon as they are required. In contrast, Clam Lake Township does not have the infrastructure nor the facilities to provide TeriDee with the necessary utilities for its planned development. Likewise, Haring Township does not have public sanitary sewer services and cannot provide such services to TeriDee until at least the summer of 2015. ROP, Tab 7B.

B. The State Boundary Commission Invalidated the Townships' Prior Act 425 Agreement, Characterizing It as "Bovine Scatology."

On June 3, 2011, TeriDee filed its first application with the SBC that would have allowed the Property, along with other property, to be annexed into the City of Cadillac. 8/8/12 SBC

² Less than 6.5 acres of private property, contained in seven separate parcels, is owned by others. Of these seven owners, two have indicated to TeriDee that they have no objections to the annexation. ROP, Tab 7B.

Summary of Proceedings, Findings of Fact, and Conclusions of Law, **Tab 2**.³ After TeriDee filed its 2011 annexation petition, the Townships hurriedly compiled an Act 425 agreement that contemplated some non-specific, future development for the same land. *Id.* As if the timing and content of the agreement was not evidence enough, communication between the Townships and the leaders of the neighborhood opposition makes clear that the 2011 agreement was engineered solely to "avoid the possibility of the Boundary Commission making the decision on the development project." ROP, Tab 7A.

The Townships' attempted misuse of Act 425 did not fool the SBC. Their sham agreement was rejected by the SBC without dissent and with a member of the SBC characterizing the agreement as "bovine scatology." The SBC specifically concluded that the Townships' first Act 425 agreement was "invalid" because "it was not being used to promote economic development." 8/8/12 SBC Summary of Proceedings, Findings of Fact, and Conclusions of Law (Tab 2). This determination was based on the following facts regarding the Townships' first Act 425 agreement:

- a. No clearly defined economic development project is named.
- b. Clam Lake Township received no benefit from the agreement, i.e., there is no revenue sharing included.
- c. Copies of e-mails obtained by the petitioner through a Freedom of Information Act Request and provided to the Commission between Clam Lake Township and the Charter Township of Haring discussed the 425 agreement as a means to deny the Commission jurisdiction over the proposed annexation.

³ As the Townships noted in their Application, the SBC filed the ROP with the Circuit Court on August 7, 2014, and the ROP was subsequently supplemented on September 29, 2014. Like the Townships, TeriDee has in most instances cited to the documents in the ROP as opposed to attaching them separately to its Response. There are a few instances in which TeriDee has attached exhibits from the ROP. Those documents are cited herein as **Tabs 1 through 5**.

- d. Concern over the Charter Township of Haring's ability to effectively and economically provide the defined public services. No cost study was proven to analyze the differential connecting the area to public services from the Charter Township of Haring versus connecting to services from the city of Cadillac.
- e. The timing of the 425 agreement. The agreement was executed more than three months after the annexation request was filed.

Id.

Notwithstanding that the Townships' Act 425 agreement was rejected, TeriDee's 2011 annexation petition was ultimately denied, without explanation, pursuant to an October 3, 2012, final decision and order by the Department of Licensing and Regulatory Affairs ("LARA"). *Id.* With TeriDee's proposed development at least temporarily on hold, the Townships did not even bother to keep up the charade that they were interested in any development of TeriDee's property. Indeed, the Townships did not bother to prepare a new Act 425 agreement until the eve of the filing of TeriDee's renewed annexation petition. ROP, Tab 7A.

C. The Townships Entered Into a Second Act 425 Agreement in an Attempt to Thwart TeriDee's Renewed Annexation Petition.

The SBC rules allow for the filing of a new annexation petition no earlier than two years after the previous petition was filed. MCL 123.1012(3). Pursuant to this rule, TeriDee filed its new annexation petition on June 5, 2013. When the Townships, which continued to oppose TeriDee's proposed development, became aware of TeriDee's intention to file a new petition, they immediately resorted to a familiar scheme: entering into a sham Act 425 agreement.

The Townships continue to devote significant time and effort in their Application for Leave to Appeal in describing the supposed genesis of the Act 425 Agreement. This is no doubt motivated by their realization that they face an uphill battle convincing anyone that their new Act 425 Agreement, which they executed less than ten months after their first Act 425 agreement was

rejected by the SBC, is the result of pure motives and a genuine change of heart regarding the development of the Property.

According to the Townships in their filings with the SBC, the Act 425 Agreement "represents the fruition of a long-established, thoroughly-evaluated plan." ROP, Tab 7C. Indeed, the Townships would have this Court believe that the Act 425 Agreement was the result of deliberation and discussions that date back to 1999 regarding the Townships' plans for sharing utility services. *Id.* The Townships further maintain that they each independently decided that May 8, 2013, was an "ideal time" to hold a special meeting to enter into the Act 425 Agreement, which, as they claim, is "the culmination of long-established plans to extend Haring utility services to Clam Lake." *Id.*

Both the SBC and the circuit court rightfully rejected this false narrative, based in part on the e-mail communication between Township representatives and the leaders of the neighborhood opposition groups. Those e-mails likely gave the SBC a sense of déjà vu. They involve the same key individuals, they were sent to the same distribution lists, they express the same alarm at the proposed annexation and development of the Property, and they propose the same solution to this perceived problem: an Act 425 agreement. All e-mails at issue in this matter are attached hereto collectively as **Tab 3**. Most significantly, they remove any doubt that the Act 425 Agreement was entered into for any reason other than to block the annexation.

At the public hearing in the proceedings below, the City of Cadillac's mayor *pro tem*, Art Stevens, reported that on April 11, 2013, a city official informed Clam Lake officials that TeriDee would be filing a new annexation petition. In response to this news, there was an immediate e-mail exchange (among the same individuals who previously supported the effort to prevent TeriDee's annexation petition by filing a sham Act 425 agreement) that specifically

mentions using an Act 425 agreement as a strategy to prevent annexation. The e-mail further suggests that, this time around, the Townships should enact the agreement "BEFORE" the annexation petition is filed in order to convince the SBC that the Townships are not engaged in a "ploy." *Id.* Less than a month later, the agreement was both introduced and approved at a joint special meeting of the Township boards.

Four days later, in an April 15, 2013, e-mail exchange between, among others, George Giftos (vice chairman of the Haring Planning Commission) and Dale Rosser (the Clam Lake supervisor), the Townships' true motivation in entering into the Act 425 Agreement was revealed. That e-mail exchange, entitled "here we go again," makes clear that the Townships had learned within "the last few days" that TeriDee was preparing to file an annexation petition:

The rumor is that Teri-Dee will re-file for annexation to the City on June 4. How can that happen, you ask? I thought we had 2 years before they could file again. Well, we did, but it's 2 years from the original date of their filing and that was June 4, 2 years ago! If they fast-track the project and the State Boundary Commission approves, Teri-Dee could conceivably be all set to go by the end of summer.

Now, what are our options? As I see it, the reason that the 425 agreement with Haring TWP was thrown out by the State Boundary Commission was that it was deemed to be a ploy and had been filed AFTER the filing by Teri-Dee for annexation. If we were to pursue this again and got it done BEFORE June 4, that argument would no longer apply.

Id. (emphasis added).

Other e-mails produced by the Townships make clear that the Townships and their supporters did not suddenly change their minds about the development of the Property. They continue to vigorously oppose any commercial development of the Property, and the e-mails express optimism that the stringent zoning requirements in the Act 425 Agreement will stifle any proposed development and send it somewhere else. On May 4, 2013, four days before the Townships entered into the Act 425 Agreement, George Giftos wrote to the Townships'

supervisors, Dale Rosser and Bob Scarbrough, to express his optimism that the restrictive PUD requirements in the Agreement would drive away any potential development:

[I]f I were bringing a retail business to Cadillac, and I were to investigate this PUD with its restrictions, I would choose to locate at Boon Road where the other commercial development is going on, so I feel that while we would allow commercial development at M-55, it wouldn't happen.

Id. The Townships' failure to disclose or provide these e-mails to the SBC is particularly disturbing given the Townships' repeated claims in the proceedings before the SBC that, this time around, there were no e-mails showing improper motive. Given the timing of the e-mails, it is now clear that these claims by the Townships were false when made. Likewise, the Townships twice filed motions to supplement the record before the SBC, but failed to produce the e-mails. ROP, Tabs 9A, 10A. It is obvious why the Townships did not want the e-mails to reach the SBC.

In sum, the e-mails do not in any way support the Townships' repeated statements to the SBC that the reason they entered into the Act 425 Agreement was for the purpose of sharing utilities. There is not a single e-mail (or any other communication) involving Township representatives that discusses or proposes entering into an Act 425 agreement for the purpose of sharing utilities. Instead, just as with the e-mails that were produced in connection with the 2011 annexation petition, the only time an Act 425 agreement is ever mentioned is solely in connection with preventing annexation and development. And that is the sole reason why the Townships entered into the agreement.

D. The Townships' Latest Act 425 Agreement Does Not Require Haring to Provide Utilities.

As part of their effort to lend credibility to their Act 425 Agreement, the Townships claim that they entered into the agreement to facilitate the sharing of utilities. The Act 425 Agreement does not resemble anything close to a utility sharing agreement. First and foremost, it is

undisputed that there is no requirement in the Act 425 Agreement that Haring provide any utilities to any property in Clam Lake. Instead, the most the agreement requires is that the Townships "mutually cooperate" in "exploring the extension of Haring public wastewater services to other areas of Clam Lake, subject to the availability of those services." ROP, Tab 3D at 5–6. This requirement to "mutually cooperate" and "explore" the potential extension of utilities imposes no obligation on Haring and provides no benefit to Clam Lake. Haring is not even required to "mutually cooperate" with Clam Lake unless and until water and sewer utilities are first extended to the Transferred Area. See *id.*

However, there is no requirement to extend water or sewer utilities to the Transferred Area. The Townships do not dispute the fact that there are no properties in the Transferred Area that currently need water or sewer utilities from Haring and that none of the property owners in the Transferred Area have requested that Haring provide those services. Thus, there will be no extension of Haring water or sewer services to the Transferred Area unless and until the Property is first developed. This is confirmed by the language of the Act 425 Agreement, which provides that Haring is only required to extend water and sewer to the "newly-developed portion of the Transferred Area" and only under the condition that Clam Lake pay for all of the costs to extend the utilities. See *id.* at 4–5. At the same time, the Agreement contains obstacles to any such development: ten pages of requirements and regulations that a property owner must satisfy before the property can be developed. *Id.*

In addition, while the proceedings below were pending, the Townships passed identical resolutions of intent that specifically provide that water and sewer utilities will not be provided to the Transferred Area unless the Townships enter into an agreement with TeriDee to develop the Property under which TeriDee agrees to cover all of the costs. ROP, Tab 7C. But, TeriDee

is not, and has never expressed an interest in, developing the Property under the conditions and restrictions set forth in the Act 425 Agreement. ROP, Tab 6D at 72–74. Common sense alone dictates that if the Act 425 Agreement truly was the culmination of over 15 years of "thorough" planning, it would not condition the provision of utilities on a development project that the Townships vehemently oppose and which was not even contemplated until a few years ago. The Act 425 Agreement is not a utilities sharing agreement, and it is disingenuous for the Townships to suggest otherwise.

E. The Circuit Court Ruled that the Townships' Act 425 Agreement Is Void as Unconstitutional and Against Public Policy in a Separate Proceeding.

Prior to the Circuit Court's opinion in this case affirming the SBC's decisions, it entered a separate opinion and order in a separate proceeding that also invalidated the Townships' Act 425 Agreement, but on separate grounds. TeriDee filed an original action in the Circuit Court against the Townships on August 13, 2013. On September 19, 2014, the Circuit Court entered summary disposition in favor of TeriDee on Count II of TeriDee's complaint, which requested a declaration from the court that the Townships' Act 425 Agreement is invalid, unconstitutional, and violative of public policy because the agreement contracted away Haring's legislative zoning powers. The Circuit Court agreed with TeriDee and held that the Act 425 Agreement is void because of its illegal zoning provisions. 9/19/14 Op & Order at 16, **Tab 4**.

F. The SBC Again Invalidated the Townships' Sham Act 425 Agreement and Also Approved TeriDee's Annexation Petition, a Decision that Was Affirmed by the Circuit Court on Appeal.

As set forth above, TeriDee filed its annexation petition on June 5, 2013. ROP, Tab 1A. Over the Townships' filed objection, the SBC determined that the petition was legally sufficient on July 13, 2013. ROP, Tabs 3F, 3G. The SBC held a public hearing on October 23, 2013, and then held an adjudicative session on April 16, 2014. At the adjudicative session, the SBC

invalidated the Townships' Act 425 Agreement and approved TeriDee's annexation petition, reaching both decisions by a 4-1 vote. These decisions are set forth in the SBC's proposed Summary of Proceedings, Findings of Fact, and Conclusions of Law, which it issued on June 11, 2014. 6/11/14 SBC Summary of Proceedings, Findings of Fact, and Conclusions of Law, **Tab 5**. The director of LARA issued a Final Decision and Order on June 26, 2014, approving the SBC's proposed findings. *Id.* The Circuit Court affirmed the SBC's decisions on December 9, 2014. The Townships' Application for Leave to Appeal then followed.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the decisions of the SBC in accordance with the Administrative Procedures Act, MCL 24.201, *et seq.*, and MCR 7.103(A)(3). Specifically, the Court must review the SBC's findings to determine whether competent, material, and substantial evidence existed to support the SBC's decision. *Midland Twp v State Boundary Comm'n*, 401 Mich 641; 259 NW2d 326 (1977); *Casco Twp*, 243 Mich App at 397; MCL 243.06. The determination of subject matter jurisdiction is a question of law that is reviewed *de novo* on appeal. *Estes v Titus*, 481 Mich 573, 578–79; 751 NW2d 493 (2008).

In *Midland Township* the Michigan Supreme Court provided a lengthy analysis of the proper standard of judicial review of annexation orders. *Midland Twp*, 401 Mich at 672–74. The Court first noted that the Administrative Procedures Act provides for judicial review of SBC proceedings based upon "a determination of whether the administrative action is supported by competent, material and substantial evidence on the whole record." *Id.* at 677 (citing MCL 24.306(d)). The Court then explained how it has previously interpreted the meaning of the "key phrase" in this standard of review, "substantial evidence":

The key phrase "substantial evidence" has been construed by this court to require "a thorough judicial review of administrative decision, a review which considers the whole record that is, both sides of the record not just those portions of the record supporting the findings of the administrative agency. Although such a review does not attain the status of a *de novo* review, it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency. Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact finding by displacing an agency's choice between two reasonably differing views. Cognizant of these concerns, the courts must walk the tightrope of duty which requires judges to provide the prescribed meaningful review."

Id. at 672–73 (internal citations omitted)(emphasis added). Further, the Michigan Supreme Court noted that "resolution of a controverted annexation unavoidably involves political considerations and the exercise of a large measure of discretion." *Id.* at 673. For this reason, the Court cautioned that reviewing courts must not engage in a review of such political determinations:

Evaluation of the record and the Commission's balancing of the criteria and determination of reasonableness implicates the merits of the proposed annexation and poses considerable risk of drawing the judiciary into the resolution of what continues to be despite the adoption of the administrative format essentially a political question. No vested right or legally protected interest being involved, the judiciary ought to be especially circumspect in reviewing Commission rulings and determinations.

Id. at 673–74 (emphasis added).

Importantly, this same standard of review applies to the SBC's decision to invalidate the Townships' Act 425 Agreement. While the Townships claim that this Court should review that finding under the *de novo* standard, they are wrong. In arguing for this far less deferential standard, the Townships state that the issue of whether a contract complies with a statutory criterion is a question of law, subject to *de novo* review on appeal. While that is a true statement of the law generally, it is not an accurate statement of the issue on appeal below with respect to the Act 425 Agreement.

In the proceedings below the SBC made the factual finding that the Townships entered into the Act 425 Agreement solely as a means to bar annexation. As a result of this factual finding, the SBC concluded that the Act 425 Agreement was invalid as it was not enacted to promote economic development. In order to overcome the SBC's conclusion that the Act 425 Agreement is invalid, the Townships must successfully overcome the factual findings that support that determination. They can only do that if they can demonstrate that those findings were not supported by competent, material, and substantial evidence. Indeed, the Court of Appeals could not have been more clear on this point in *Casco Township*, the single appellate decision on this precise issue:

The second issue for our consideration is whether the commission erred in concluding that the underlying agreement was illusory and therefore not valid. We review the commission's findings for whether competent, material, and substantial evidence existed to support the commission's findings.

Casco Twp, 243 Mich App at 400 (citing *Midland Twp*, 401 Mich at 672); MCL 24.306(1)(d); MSA 3.560(206)(1)(d). The Townships simply ignore this language in *Casco Township* and blindly march forward with page after page of case law discussing the standard of review regarding an agency's interpretation of a statute.

The SBC's findings more than satisfy the proper, and circumspect, standard of review on both issues before the Court. This is why the Townships brazenly suggest that the Court go beyond the prescribed standard of review, encouraging this Court to apply a *de novo* review to the SBC's factual determination regarding the Act 425 Agreement. This is an inquiry that the Court should not undertake, and it is improper for the Townships to suggest otherwise.

II. THE SBC HAS JURISDICTION TO DECIDE THE VALIDITY OF AN ACT 425 AGREEMENT.

In their first argument, a new argument raised for the first time in their Application, the Townships ask the Court to overturn *Casco Township*. The Townships' argument is fatally

flawed on numerous grounds and is not supported by the principles of *stare decisis*. There is no basis at all for the Court to overturn *Casco Township*, let alone a "compelling justification," the standard required under the doctrine of *stare decisis*. The decision should be upheld, and the Townships' Application should be denied.

As the United States Supreme Court has explained, the doctrine of *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v Tennessee*, 501 US 808, 827; 111 S Ct 2597 (1991). For this reason, "a *stare decisis* analysis should always begin with the presumption that upholding the precedent involved is the preferred course of action." *Petersen v Magna Corp*, 484 Mich 300, 317; 773 NW2d 564 (2009). Thus, the presumption in favor of upholding precedent "should be retained until effectively rebutted by the conclusion that a compelling justification exists to overturn the precedent." *Id.* at 317.

Here, there is no compelling justification for overturning *Casco Township*. Indeed, this Court previously declined to consider Appellants' application for leave to appeal from the *Casco Township* decision itself, and for good reason. The Court of Appeals' reasoning, analysis, and decision in *Casco Township* are sound and are based on multiple decisions of this Court, decisions that the Townships failed to even address in their Application. For example, the court in *Casco Township* cited to this Court's decision in *Shelby Charter Township v State Boundary Commission*, 425 Mich 50; 387 NW2d 792 (1986), a decision that both supports and closely parallels the *Casco Township* decision.

In *Shelby Charter Township* the appellant township challenged the SBC's decision allowing annexation by a contiguous city. The township argued that the SBC lacked jurisdiction

to consider the annexation petition based on language in MCL 42.34, which provides that a township is exempt from annexation if it meets certain statutory criteria, including that the township "provides water or sewer services, or both, by contract or otherwise." MCL 42.34(1)(f). Evidence was presented to the SBC that indicated that the township only provided sewer services in 6 percent of its territory and provided water services to less than one-third of its population. *Shelby Charter Twp*, 425 Mich at 54–55. The SBC found that the level of services provided by the Townships failed to meet the statutory requirement. Just as the Townships argue in this case, the township attempted to use the language from a separate statute to support an argument that the SBC lacked jurisdiction. According to that argument, as long as a township provided any water and sewer services, the language in MCL 42.34 prevented the SBC from even considering an annexation petition. This Court rejected that argument in *Shelby Charter Township*, just as it should reject the Townships' attempt to revive that argument here.

Specifically, the Court held that the SBC correctly interpreted MCL 42.34 as requiring more than the provision of *de minimus* services and that the mere provision of *de minimus* water services did not act to deprive the SBC of jurisdiction to consider an annexation petition. *Id.* at 75–76. As such, the SBC was correct in looking to the facts and substance of the services provided—and had the authority to do so. *Id.* at 77.

Given the Townships' arguments, it is significant to note that this Court reached its holding in *Shelby Charter Township* notwithstanding the fact that, just as with Act 425 Agreements, there is no express statutory language discussing the SBC's jurisdiction or authority to consider the level or quality or quantity of water or sewer services provided. This is of course consistent with this Court's holding that the SBC and other administrative agencies have those implied powers that are "necessary to the due and efficient exercise of the powers expressly

granted." *Ranke v Corp & Secs Comm'n*, 317 Mich 304, 309; 26 NW2d 898 (1947)(internal quotation omitted).⁴ The decision in *Shelby Charter Township* is also consistent with this Court's holding that an administrative agency has the authority to make factual determinations as to whether it has jurisdiction to consider annexation petitions. See, e.g., *Judges of the 74th Judicial Dist v Bay Cnty*, 385 Mich 710, 728–29; 190 NW2d 219 (1971); *Pet Labor Mediation Bd*, 365 Mich 645, 655; 114 NW2d 183 (1962). That is exactly what the SBC does when it considers issues like whether a township is providing more than *de minimus* water services or whether two townships have entered into a legitimate Act 425 agreement or a sham document designed to act as "shark repellent."

In sum, the Court's holding in *Casco Township* is consistent with and supported by the body of case law developed by this Court as well as the "broad powers concerning annexations" that have been conferred upon the SBC by the legislature. *Owosso Twp v Owosso*, 385 Mich 587, 590; 189 NW2d 421 (1971). There has been no change in the law since 2001, when this Court previously declined to consider an application challenging that decision. There is no reason for the Court to change course today.

Not only does *Casco Township* continue to remain good law, it continues to make good sense. As the Townships themselves have previously argued, the SBC is "uniquely suited" to determine the validity of Act 425 agreements and "must" necessarily make such determinations in every annexation case involving an Act 425 agreement. See Tab 1 at 13. The Townships'

⁴ Likewise, in *Coffman v State Board of Examiners in Optometry*, 331 Mich 582, 590; 50 NW2d 322 (1951), the Court stated that an administrative agency's "powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication" (emphasis added)(internal citation and quotations omitted). In *Ghidotti v Barber* and *Clonlara v State Board of Education*, the Court quoted Bienenfeld, Michigan Administrative Law (2d ed.), ch. 4, pp. 18–19, with approval: "Rulemaking authority may . . . be inferred from other statutory authority granted to an agency." *Ghidotti v Barber*, 459 Mich 189, 202; 586 NW2d 883 (1998); *Clonlara v State Bd Educ*, 442 Mich 230, 237; 501 NW2d 88 (1993).

prior arguments echo those of the Court of Appeals in *Casco Township*, which correctly notes that the SBC could not "perform its function of resolving the [annexation] petition" without first considering the validity of the Act 425 Agreement. *Casco Twp*, 243 Mich App at 399. To contend otherwise, as the Townships (now) do, is to argue that the legislature intended to allow two townships to collude with one another and enter into sham Act 425 agreements that could deprive the SBC of jurisdiction and repel an annexation indefinitely. This is most certainly not what the legislature intended, as has been obvious to every court and tribunal that has considered this issue.

III. THE CIRCUIT COURT CORRECTLY HELD THAT THE SBC'S DECISION TO INVALIDATE THE TOWNSHIPS' ACT 425 AGREEMENT WAS SUPPORTED BY COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE.

In *Casco Township* the Court of Appeals held that the SBC has the jurisdiction and authority to invalidate illusory Act 425 agreements that are a mere pretext to avoid annexation. This is exactly what the SBC did in this case. The SBC specifically found that the Townships' Act 425 Agreement "was created solely as a means to bar the annexation and not as a means of promoting economic development." 6/11/14 SBC Summary of Proceedings, Findings of Fact, and Conclusions of Law at 2 (Tab 5). As the Court of Appeals held in *Casco Township*, such a finding will be upheld if the parties "developed a record" that could support the SBC's conclusion. *Casco Twp*, 243 Mich App at 402. There is no question that the SBC's decision in this case was supported by competent, material, and substantial evidence, and it was therefore properly upheld by the Circuit Court.

A. The Townships Mischaracterize the Holding and Analysis in *Casco Township*.

This case presents the rare circumstance when there is a single binding precedent that governs an issue on appeal. That precedent, the Court of Appeal's decision in *Casco Township*,

is fatal to the Townships' argument with respect to their Act 425 Agreement and their efforts to have this Court undertake a *de novo* review on appeal. Because of this, the Townships improperly attempt to distort the holding, analysis, and facts in *Casco Township*. In particular, the Townships argue that the Court of Appeals' holding in *Casco Township* was limited to the proposition that the SBC has subject matter jurisdiction to determine whether an Act 425 agreement satisfies the statutory criteria of Act 425. In order to advance this interpretation, the Townships have to ignore what the Court of Appeals actually wrote in its opinion, which is why they improperly suggest that most of the *Casco Township* decision is dicta.

There were two separate issues on appeal before the Court of Appeals in *Casco Township*, both of which were issues of first impression. *Casco Twp*, 243 Mich App at 395. The first issue involved the question of whether the SBC had the jurisdiction and authority to determine "whether an Act 425 agreement is valid" or whether it is "a fictional agreement intended only to deprive the commission of jurisdiction." *Id.* at 398–99. The Court of Appeals held that the SBC had the authority and jurisdiction to make that determination.

The second issue on appeal was "whether competent, material, and substantial evidence supported the commission's determination that the Act 425 agreements were merely a pretext to avoid annexation." The Court of Appeals held that the Circuit Court and SBC correctly concluded, based on the factual record before them, that there was competent, material, and substantial evidence to support the finding that the agreements were entered into to avoid future annexation "as an act of subterfuge intended to preclude the commission's jurisdiction and to avoid future annexation." *Id.* at 402.

Contrary to the Townships' assertion on appeal, the question of whether the parties "entered into" an Act 425 agreement for an improper purpose is necessarily a factual inquiry.

While the result of that factual inquiry may be that the Act 425 Agreement is determined to be legally invalid, that determination will be based on the factual circumstances surrounding the enactment of the agreement, the parties' conduct, and a variety of other factors.

Thus, as the Court of Appeals noted in *Casco Township*, the SBC's determination that the Act 425 agreements at issue were invalid as "fictional agreements intended only to deprive the commission of jurisdiction" were based on the following factual findings by the SBC:

- Evidence of advertisements soliciting petition signatures in opposition to the annexation petition that contained the statement, "Help us in the preservation of farm land and open space." *Id.* at 400–01. Notably, there was no mention in *Casco Township* that this communication involved township representatives, as does the communication in this case.
- The fact that the Act 425 agreements did not provide "any real plan for economic development" and only "vaguely contemplated a plan of development at some point in the future." *Id.* at 401, 402.
- The fact that the township could not currently provide the required water or sewer services and would not be in a position to do so for at least a year and a half. *Id.* at 401.
- The township's failure to provide evidence that the property at issue was transferred, including a showing of a transfer of property tax records or voting records. Importantly, the SBC did not find that such evidence was necessary to show a valid transfer of land under Act 425, and the Court of Appeals noted that this evidence was simply one of the relevant considerations as part of the SBC's overall findings. *Id.* at 402.

Based on these factual findings, both the Circuit Court and the Court of Appeals concluded that there was competent, material, and substantial evidence to support the SBC's conclusion that the Act 425 agreements were illusory in nature and entered into in order to avoid future annexation. In that regard, it is important to note that the Court of Appeals made clear that no one fact or factor was conclusive. To the contrary, the Court of Appeals noted that "the precise reasoning behind the commission's disregard of the Act 425 agreement is not entirely clear." *Id.* That being said, the Court of Appeals affirmed the SBC's decision on the basis that

the parties had developed a sufficient factual record, giving due deference to the SBC's findings. *Id.*

The holding in *Casco Township* is contrary to the Townships' argument that the SBC "rewrote" the Act 425 statute in this case by adding additional requirements that must be met in order to have a valid agreement. That is incorrect. The Court of Appeals in *Casco Township* did not set any parameters on the facts that can be considered in determining whether an Act 425 agreement was entered into to avoid annexation. As such, the SBC can properly consider, for example, the timing of the agreement, the parties' communication and conduct, the ability of the parties to provide the required services, the benefits to the parties under the agreement, and the described proposed economic development project. All of these factors could support a finding that an Act 425 agreement is illusory. This is exactly what occurred in the proceedings below.

B. Just as in *Casco Township*, the SBC's Conclusion in This Case that the Act 425 Agreement Is Invalid Was Supported by Competent, Material, and Substantial Evidence.

The SBC properly invalidated the Townships' Act 425 Agreement as a sham agreement that "was created solely as a means to bar the annexation and not as a means of promoting economic development." 6/11/14 SBC Summary of Proceedings, Findings of Fact, and Conclusions of Law at 2 (Tab 5). This determination was based on five primary factors, all of which were supported by the record below.

First, the SBC found that the economic development project that is "allowed" by the Act 425 Agreement is not viable, and for good reason. As the SBC correctly noted, it is undisputed that at the time the Townships entered into the Act 425 Agreement, they had not discussed a potential development project with TeriDee, the owner of the only vacant land in the Transferred Area. ROP at Tab 11D, 9. It is common sense that if the Townships were genuinely interested

in an economic development project, they would have discussed that potential project with the only potential developer.

Moreover, just as in *Casco Township*, the Townships' Act 425 Agreement only vaguely contemplates some unspecified development ("the provision of mixed-use commercial/residential development") at some unspecified point in the future. ROP, Tab 3D at 5. This is hardly an improvement from the vague description in the Townships' first Act 425 agreement ("development of additional residential housing"). ROP at Tab 11D, 12. Indeed, the record makes clear that the Townships entered into their agreement notwithstanding the fact that there was no one interested in a development project that would have to meet the ten pages of development restrictions and regulations set forth in the Townships' agreement. Indeed, the SBC saw an e-mail from George Giftos, the vice chairman of the Haring Planning Commission, to the Townships supervisors in which Mr. Giftos expressed his optimism that the restrictions in the Act 425 Agreement would drive away any potential development. ROP, Tab 13A, Ex. D. This evidence supports the SBC's finding that there was not a viable, or genuine, economic development project.

Second, the SBC correctly found that Clam Lake received no benefit from the agreement. Specifically, the Act 425 Agreement provides that Clam Lake relinquish total control of the Transferred Area and give up hundreds of thousands of dollars of taxable value and tens of thousands of tax dollars. In exchange, Clam Lake receives no tax sharing, no property tax, no personal property tax, no revenue sharing, and no specific infrastructure. ROP at Tabs 7A, 7B. While the Townships claim in their Application that they agreed to amend the Act 425 Agreement to share in the utility revenue if the utilities are extended to the Transferred Area, the SBC received evidence that shows that this assertion is false. All that the Act 425 Agreement

requires with respect to potential future revenue sharing that "may be necessary" is that the Townships "negotiate in good faith" with respect to an amendment to the Act 425 Agreement. *Id.*, Ex. A, art. II.

The SBC also received evidence of the fact that the Act 425 Agreement contains almost two pages devoted to Clam Lake reimbursing and indemnifying Haring for virtually every conceivable scenario arising out of the agreement, including proceedings before the SBC and judicial proceedings involving the agreement. *Id.*, art. XII. The lack of revenue sharing when the agreement places all of the cost and risk on Clam Lake further supports the SBC's finding that the agreement is illusory and entered into solely to thwart the annexation. Indeed, the SBC could certainly conclude that no municipality would ever approve of such a one-sided agreement unless it was entered into solely to divest the SBC of jurisdiction.

In addition, the SBC heard and received evidence that Haring had no obligation to provide water and sewer utilities to Clam Lake under the agreement, but was only required to "mutually cooperate" in "exploring" the extension of water and sewer to Clam Lake (which is no obligation at all) and only in the event that water and sewer was first extended to the Transferred Area. See, e.g., ROP, Tab 7B. However, the Townships—which vehemently oppose TeriDee's proposed development of the Property—are in complete control over whether that development ever occurs. Thus, there was more than adequate evidence for the SBC to properly conclude that Clam Lake received no benefit from the Act 425 Agreement and that it was a sham designed to accomplish a different purpose than the one stated.

Third, the SBC's finding is properly supported by the e-mail correspondence between Clam Lake and Haring Township officials and area residents that TeriDee provided to the SBC. The Townships cannot dispute the fact that these e-mails specifically discuss using an Act 425

agreement as a means to deny the SBC's jurisdiction over TeriDee's proposed annexation. The best the Townships can come up with is the argument that—this time around—the Township supervisors themselves did not specifically make these statements. However, Haring Township planning commissioner George Giftos was in the thick of the new scheme, as the e-mails clearly reflect. Moreover, as the SBC noted at the adjudicative session, the Township supervisors, who were copied on the e-mails in question, made no effort to deny or disavow the fact that the Act 425 Agreement was being used for this improper purpose. ROP, Tab 13A.

In addition, and perhaps most importantly, the fact that the communication involving Township representatives only discusses using an Act 425 agreement to block the annexation and never for any legitimate purpose (such as utility sharing) is certainly substantial evidence of the Townships' improper motives.

Fourth, the SBC's finding was based on considerations of the Townships' ability to effectively and economically provide the required water utilities. The Townships concede that the capital cost of providing public sewer and public water to the Property will be more than twice as much as obtaining those services from the City of Cadillac, a difference of \$1,250,000, exclusive of the costs attributable to the acquisition of necessary easements and the cost of approximately \$300,000 for a water storage tank. Moreover, TeriDee's engineer projects that the cost of Township utilities will be nearly three times the cost of City utilities, a difference of almost \$2 million. These cost differences do not take into account the continuing higher O & M and commodity costs for the Township utilities as compared to City utilities. ROP at Tab 7B.

As the SBC heard in the proceedings below, development of the Property cannot be justified given the huge differential of utility costs to be paid upfront and entirely by the

developer. There can be no economic development of the Property under the Townships' cost structure, which is exactly what the Townships intended. *Id.*

The SBC also received evidence demonstrating that the Townships cannot effectively or timely provide the required water utilities as compared to the City. For example, the Haring waste water treatment plant may be ready "as early as the summer of 2015," a date that has consistently "slipped" over the past few years. In contrast, the City has a reasonably priced public sewer available immediately across the highway and a fully functioning waste water treatment plant. *Id.*

Likewise, while the City has a well field across the highway from the Property, Haring's nearest water supply is approximately 2.5 miles away. Because of this distance, the SBC heard evidence that raised questions regarding the reliability of Township water utilities as compared to those same services from the City. Specifically, as the evidence in the record below makes clear: (1) water utility service from the City of Cadillac would be more reliable than service from Haring; (2) the City of Cadillac can provide superior water pressure and fire flow than the minimal service that Haring "should" be capable of providing; (3) the Townships' engineers did not address the concern of higher usage rates associated with Haring water utilities; and (4) the Townships' engineers, while conceding that it will take longer for the Townships to construct the necessary utility extensions, did not properly account for the added time associated with designing and obtaining easements or permission and permits to install the water main along county or MDOT right-of-ways. *Id.*; see also ROP at Tab 10B.

Fifth, the SBC correctly determined that the timing of the Act 425 Agreement supported the conclusion that it was a sham. In *Casco Township* the townships entered into their Act 425 agreements several months before the property owners filed their annexation petitions. *Casco*

Twp, 243 Mich App at 396. Here, the timing is even more compelling, as the Townships did not begin the process of enacting their agreement until they learned of TeriDee's intention to file a new annexation petition. The Townships then rushed to enter into their agreement between April 15, 2013, and May 8, 2013, when they called a joint special meeting to approve the contract. Moreover, as the SBC specifically noted during the adjudicative session, while the Townships represented during the 2011 SBC proceedings that they were ready to immediately proceed with development under their prior Act 425 agreement, they undertook no work on a new agreement until they learned of TeriDee's plans to re-file for annexation. ROP at Tab 11D, 41.

Finally, unlike in *Casco Township*, the SBC in this case had before it the compelling fact that the Townships recently had their previous Act 425 agreement invalidated as a sham. This history is highly relevant and supports the SBC's findings regarding the Townships' motivations in entering into their second Act 425 Agreement. The fact that the Townships withheld the e-mails referenced above from the Commission—while essentially boasting that there were no incriminating e-mails this time around—likely did little to bolster their credibility. ROP at Tabs 10B, 10C.

Thus, just as in *Casco Township*, the SBC's decision to invalidate the Townships' Act 425 Agreement was based on substantial evidence. Any one of the foregoing factors would have been sufficient to support the SBC's decision. Combined, they made the SBC's decision unassailable on appeal.

IV. THE CIRCUIT COURT CORRECTLY HELD THAT THE DOCTRINE OF COLLATERAL ESTOPPEL HAS NO APPLICATION IN THIS CASE.

The Townships did not raise the doctrine of collateral estoppel before the SBC, and they did not provide any authority to support their argument on appeal before the Circuit Court. That

is, the Townships did not provide any Michigan case law on appeal in which (1) the doctrine of collateral estoppel has been applied from one administrative proceeding to another; (2) the doctrine of collateral estoppel has been applied to an SBC decision; or (3) the doctrine of collateral estoppel has been applied to a Michigan administrative proceeding where there is a statutory right of reapplication. All of that is not to say that there is anything novel about the Townships' argument, which is easily defeated by the routine application of the law of collateral estoppel to the facts of this case.

Faced with the lack of any supporting Michigan authority, the Townships attempted to file a post-hearing supplemental brief in the appeal below with federal court decisions involving the Social Security Act and the Federal Black Lung Benefits Act, authority that the Townships also present in their Application for Leave to Appeal. However, this supplemental authority is completely inapposite because none of the federal decisions apply nor discuss the additional, specific requirements that Michigan courts apply with respect to collateral estoppel at the administrative proceedings level. As such, the federal case law presented in the Townships' Application is completely irrelevant.

In order for collateral estoppel to apply to an administrative proceeding under Michigan law, the proceeding must have been adjudicatory in nature, allowed for an appeal, and the legislature must have intended that the decision be final. See, e.g., *Holton v Ward*, 303 Mich App 718, 731–32; 847 NW2d 1 (2014). Moreover, the ultimate issue to be determined in the second action must be identical to that involved in the first action. *Eaton Cnty Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). None of the federal court decisions in the Townships' Application discuss these specific requirements for applying collateral estoppel

to an administrative proceeding under Michigan law, which is why they add nothing to the analysis.

As is discussed in detail below, the reason that the Townships run from Michigan law and focus their argument on a lengthy discussion of various federal cases is because they cannot satisfy any of the requirements under Michigan law for applying collateral estoppel to an administrative proceeding. The Circuit Court was not persuaded by this tactic and correctly applied Michigan law in holding that collateral estoppel does not apply in this case. 12/9/14 Op on Appeal at 14.

A. The Townships Waived the Issue of Collateral Estoppel by Failing to Raise It Below.

Despite the Townships' claims to the contrary, they did not raise the argument of collateral estoppel below, either in name or in substance. For example, while they raised several legal arguments in opposition to the Townships' annexation petition in their filed objections, they did not argue that the SBC was bound by its previous decision. Likewise, while the Townships claim in their reply on appeal that they did raise some semblance of the argument in their subsequently-filed 30-day submission, citing to pages 29 through 30 and 41, that is not true. Nowhere in their 30-day submission, including at the cited pages, do the Townships claim that the SBC is bound as a matter of law by its previous findings and determinations. Notwithstanding their failure to do so, there is nothing that prevented the Townships from raising this argument before the SBC. Indeed, the potential application of collateral estoppel was one of the issues that the SBC specifically considered—and rejected—in the *Casco Township* case. For these reasons, the Circuit Court was correct in holding that the issue of collateral estoppel "was inadequately raised with the SBC by the townships." Op at 14.

Thus, the Court should not consider the Townships' collateral estoppel argument, nor consider any supplemental briefing from the Townships on this issue, as the Townships waived this issue by failing to raise it below. It is well settled under Michigan law that "issues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers Inc v Univ Mich Bd Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Indeed, the Michigan Supreme Court has stated that it has "only deviated from [this] rule in the face of exceptional circumstances." *Id.* at 234 n23. Courts "need not address issues first raised on appeal," but they "may disregard the issue preservation requirements and review may be granted if failure to consider the issue would result in *manifest injustice*." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95–96; 693 NW2d 170 (2005)(emphasis added).

While the Townships could have asked for leave to raise the issue of collateral estoppel for the first time on appeal, they did not do so. And even if the Townships had sought leave, they could not make the required showing that there are "exceptional circumstances" that support the preservation of this issue.⁵ Nor can the Townships point to any manifest injustice that will result should this Court decline to address the issue of collateral estoppel. Indeed, to allow the Townships to raise the issue now "would contravene the longstanding rule against a party 'harboring error as an appellate parachute.'" *Id.* at 96 (quoting *Marshall Lasser PC v George*,

⁵ In fact, the Townships' failure to raise this issue below thwarted the entire rationale behind the doctrine itself. As the Michigan Supreme Court very recently noted, "The doctrine of collateral estoppel serves many purposes: it 'relieve[s] the parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication.'" *People v Wilson*, 496 Mich 91, 99; 852 NW2d 134 (2014). Here, none of those purposes could be served because the subsequent proceedings have already taken place. In short, there would be no point in retroactively applying the doctrine now, and there are certainly no "exceptional circumstances" that would warrant allowing the Townships to raise this issue for the first time on appeal. Moreover, an administrative agency itself can waive the application of the doctrine by reopening proceedings. See, e.g., *Hillier v Social Sec Admin*, 486 F3d 359, 364–65 (CA 8, 2007).

252 Mich App 104, 109; 651 NW2d 158 (2002)). Furthermore, the underlying rationale for issue preservation favors applying the rule here and declining to review the Townships' unpreserved argument. As the Michigan Supreme Court explained:

The principal rationale for the [issue preservation] rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually.

* * *

Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute.

Walters v Nadell, 481 Mich 377, 388; 751 NW2d 431 (2008). Allowing the Townships now to raise the issue of collateral estoppel would undermine the very reasons for the issue preservation rule. Accordingly, this Court should decline to address it.

B. The Legislature Did Not Intend for SBC Decisions Denying Annexation Petitions to Be Final.

It is plainly evident from the unambiguous language of the operative statute that the legislature did not intend SBC decisions to be final because that statute expressly authorizes parties—without limitation or qualification—to submit new annexation petitions two years after a prior petition was decided by the SBC. See MCL 123.1012(3). In other words, it would be perfectly permissible for a party to file an annexation petition on January 1, 2014, and, if that petition was voted down, to file it again on January 2, 2016. That is the exact opposite of a situation in which the legislature intends for a decision to be final, which is why it is nonsensical to even consider the doctrine of collateral estoppel in this setting.

The Court of Appeals has had no trouble reaching this very conclusion, referring to MCL 123.1012(3) as the "two year restriction on duplicate petitions." *Twp St Joseph v Mich State Boundary Comm'n*, 101 Mich App 407, 413; 300 NW2d 578 (1981)(emphasis added). Likewise,

in *Township of Avon v Michigan State Boundary Commission*, 96 Mich App 736, 739, 752; 293 NW2d 691 (1980), the Court of Appeals similarly rejected the appellants' claim that MCL 123.1012(3) barred a subsequent petition involving the same area.

In an attempt to keep their argument alive, the Townships make the completely unsupported assertion that a new petition can only be filed after the two-year period if there is a change in the underlying facts. The problem with this assertion is that it is not found in, nor in any way supported by, the plain and unambiguous language of the statutory provision at issue—or any other authority. That being the case, the Court must reject the Townships' argument because "clear statutory language must be enforced as written" and a reviewing court "cannot read into a statute language that was not placed there by the Legislature." *Johnson v QFD Inc*, 292 Mich App 359, 369–70; 807 NW2d 719 (2011). To require some change in the underlying facts before a new petition can be filed, as the Townships now assert is the case under MCL 123.1012(3), would clearly run afoul of this well-settled law. It would also run afoul of the Court of Appeals' previous holding on this issue in *Township of Avon*, where the Court, in rejecting an argument that the statute prohibited a later petition, specifically held that "[t]here is no ambiguity in the statute." *Twp Avon*, 96 Mich App at 752.

Thus, the only prohibition on filing a subsequent petition, even one that covers "all" of the property that was subject to a prior petition, is that the "duplicate" petition not be filed within two years after the prior petition was denied. By including the two-year language, the legislature made clear that the denial of an annexation petition was not intended to be final after two years. If the legislature intended for the first decision to be final, this statutory provision would not exist. The Townships' position either renders the statute meaningless or attempts to add

additional requirements. Because the denial of an annexation petition is not intended to be final after two years, the doctrine of collateral estoppel does not apply.

C. The SBC's Decision-Making Process with Respect to Annexation Is Not Adjudicatory in Nature.

Collateral estoppel also does not apply in this case because the SBC's decision to approve an annexation petition is not adjudicatory in nature. While the doctrine of collateral estoppel does apply to "unappealed administrative determinations that are adjudicatory in nature," it does not apply where the administrative determination involves a legislative function. *Champion's Auto Ferry Inc v Pub Serv Comm'n*, 231 Mich App 699, 712; 588 NW2d 153 (1988). Indeed, Michigan courts have repeatedly refused to apply the doctrine of collateral estoppel to decisions by the Michigan Public Service Commission fixing and regulating rates. See, e.g., *Consumers Energy Co v Mich Pub Serv Comm'n*, 268 Mich App 171, 177; 707 NW2d 633 (2005)(holding that because regulating and fixing rates is a legislative function, any prior determination by the PSC "cannot be binding under the doctrines of res judicata and collateral estoppel").⁶

Just as rate-making has repeatedly been held to be a legislative function, the same is true with respect to annexation:

The changing of the boundaries of political divisions is a legislative question, and the power to annex territory to municipalities has often been delegated to boards of supervisors or other public bodies.

Shelby Charter Twp, 425 Mich at 56 n3 (emphasis added); see also *Meridian Charter Twp v Ingham Cnty Clerk*, 285 Mich App 581, 594; 777 NW2d 452 (2009)(holding that "the fixing of

⁶ See also *Van Wulfen v Montmorency Cnty*, 345 F Supp 2d 730 (ED Mich 2004). In *Van Wulfen* the court held that proceedings to establish the normal level of an inland lake under MCL 324.30707, which required the consideration of numerous statutory factors, was legislative in nature. *Id.* at 739–40. The court reached this holding notwithstanding the fact that the process required a hearing to evaluate the competing interests of various constituencies as well as testimony and evidence. *Id.* at 740. Because the proceedings were legislative in nature, the doctrine of collateral estoppel could not apply. *Id.*

municipal boundaries is a legislative function and the Legislature is permitted to change such boundaries at will"); *Charter Twp Bloomfield v Oakland Cnty Clerk*, 253 Mich App 1, 31; 654 NW2d 610 (2002)(same; collecting authorities).

Thus, while the legislature has delegated the authority to decide annexation petitions to the SBC, it is no less of a legislative or "political" function:

In this context it is again relevant that **the power here delegated** does not involve any vested right or legally protected interest.

* * *

The annexation question is essentially political, and political considerations cannot be avoided whether the power is exercised by the Legislature itself or by an authority to which the power is delegated. The ultimate decision will be a value judgment based on the particular facts and circumstances of the annexation under consideration. It would unduly inhibit both the exercise of the Legislature's prerogative to **delegate the power to decide on annexation** and the function of the Commission to require greater particularity in the explication of criteria or standards.

Midland Twp, 401 Mich at 669 (emphasis added). Having come directly from the legislature itself, there can be no question that the power to decide annexation petitions is a legislative function. As such, the doctrine of collateral estoppel does not apply as a matter of law, regardless of the nature of the proceedings below.

D. There Has Been a Change in Circumstances in This Case, and the Ultimate Issue Considered Was Not Identical to the Prior Proceeding.

The ultimate issue to be decided in an annexation proceeding—whether a particular parcel of property should be annexed—will never be identical from one proceeding to the next, even, unlike in this case, when the exact same panel is involved in both proceedings. That is because the ultimate decision is a "political question" that will be a "value judgment based on the particular facts and circumstances of the annexation under consideration." *Midland Twp*, 401 Mich at 669 (emphasis added). For this reason, one member of the SBC may give greater weight to one or more criteria and much less weight to the others. Another member might find different

criteria to be more persuasive in making that member's decision. And any member may find a single particular criterion "to be of decisive importance outweighing all other criteria." *Id.* at 676.

It is therefore nonsensical to argue that the doctrine of collateral estoppel should be applied to a determination that is a "political question" and a "value judgment." At best, the Townships could make the novel argument that the doctrine of collateral estoppel should apply to each individual member's vote on annexation, but even that test would be satisfied in this case. The three members of the SBC panel who presided over TeriDee's previous annexation cast identical votes, while the two new members of the panel, including the Townships' designated representative, voted in favor of annexation.

Moreover, it is undisputed that the "facts and circumstances of the annexation under consideration" were not "identical" in both proceedings. *Id.*; *Schultz*, 205 Mich App at 376. As an example, the SBC received undisputed evidence in the proceedings below that the capital cost of providing public sewer and public water to the Property will be more than twice as much as obtaining those services from the City, a difference of at least \$1,250,000. ROP, Tab 13A at 5. The SBC indicated that the factual findings regarding this cost differential, which applies directly to the statutory criteria related to "the present cost and adequacy of governmental services in the area," support annexation of the Property. *Id.* In contrast, there were no factual findings by the SBC regarding the cost to provide the required utilities in the prior proceedings. Rather, the SBC simply noted that "Haring indicates that [it] can provide Clam Lake Township with the needed public services." See 8/8/12 Summary of Proceedings, Findings of Fact and Conclusions of Law (Tab 2).

As the Michigan Supreme Court made clear in *Midland Township*, the ultimate issue before the SBC—the approval of an annexation petition—can be properly based on a single, decisive criterion. *Midland Twp*, 401 Mich at 676. Here, the SBC heard undisputed evidence in the proceedings below that (1) the proposed development requires water and sewer utilities; (2) it will cost at least an additional \$1.25 million if those utilities are provided by the Townships as opposed to the City of Cadillac; (3) those costs would be imposed on the developer; and (4) the development was not viable with those additional costs. This new evidence, which was not before the SBC in the prior proceeding, supports at least one of the enumerated statutory criteria. It is therefore enough, by itself, to justify the SBC's determination, and it may have well caused certain of the commissioners to make the political, value judgment in favor of annexation. Because there was new evidence to inform the commissioners' value judgments regarding the annexation of the property, the ultimate issues in the two proceedings were not identical. For this additional reason, the doctrine of collateral does not apply in this case.

RELIEF REQUESTED

For the reasons stated above, TeriDee LLC respectfully requests that this Court deny Appellants' Application for Leave to Appeal.

Respectfully submitted,

VARNUM LLP

Attorneys for Appellee TeriDee LLC

By: /s/ Brion B. Doyle

Brion B. Doyle (P67870)

Business Address, Telephone, and E-mail:

Bridgewater Place, P.O. Box 352

Grand Rapids, MI 49501-0352

(616) 336-6000

bidoyle@varnumlaw.com

Date: July 13, 2015

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TAB 1

STATE OF MICHIGAN
IN THE 28TH JUDICIAL CIRCUIT FOR THE COUNTY OF WEXFORD

TERIDEE LLC, a Michigan limited liability company; THE JOHN F. KOETJE TRUST, u/a/d 5/14/1987, as amended; and THE DELIA KOETJE TRUST, u/a/d 5/13/1987, as amended,

Case No. 13-24803-CH

Honorable William M. Fagerman

Plaintiffs,

v

CLAM LAKE TOWNSHIP, a Michigan municipal corporation; and HARING CHARTER TOWNSHIP, a Michigan municipal corporation,

Defendants.

Brion B. Doyle (P67870)
Randall W. Kraker (P27776)
Varnum, LLP
Attorneys for Plaintiffs
Bridgewater Place
P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

Ronald M. Redick (P61122)
Mika Meyers Beckett & Jones, PLC
Attorneys for Defendants
900 Monroe Avenue, NW
Grand Rapids, MI 49503
(616) 632-8000

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

The gravamen of Plaintiffs' Complaint is that an agreement for the conditional transfer of property, entered by and between Defendants, Haring Charter Township and Clam Lake Township, under Public Act 425 of 1984, MCL 124.21, *et seq.* ("Act 425"), is invalid because said agreement (a) allegedly fails to comply with Act 425 (Count I), and (b) allegedly divests Haring, by contract, of its legislative authority to zone and rezone property (Count II). For the reasons explained herein, Counts I and II should be dismissed pursuant to MCR 2.116(C) (8), and Count II could alternatively be dismissed pursuant to MCR 2.116(C)(10).

STATEMENT OF FACTS

A. Prior Litigation Between The Parties

This action will likely sound familiar to the Court. It is a substantial repeat (with some important distinguishing characteristics) of *TeriDee, LLC, et al v Clam Lake Twp, et al*, Case No. 11-23576-CH (Wexford County Circuit Court) (hereafter, "*TeriDee I*"). As discussed below, the facts of *TeriDee I*, and the Court's decision in that case, are relevant to the current proceedings.

1. *TeriDee I*: Background Facts

On June 3, 2011, Plaintiffs filed an annexation petition with the State Boundary Commission ("SBC"), seeking to have their property, which was then located in Clam Lake, into the City of Cadillac. Pls' Compl at ¶¶ 13 and 15. A few months later, on September 19, 2011, Clam Lake and Haring approved an Act 425 Agreement covering Plaintiffs' property (and also some adjacent property) through which Plaintiffs' property was contractually transferred into the jurisdiction of Haring for a period of ten years. *Id.* at ¶21 and Exb. 1. The Townships' 2001 Act 425 Agreement became effective, upon execution, on October 19, 2011. *Id.* at ¶22.

2. *TeriDee I*: Concurrent Administrative and Judicial Proceedings

On November 1, 2011, Plaintiffs filed their complaint in *TeriDee I*. **Tab A.** That complaint

included one count, alleging that the Townships' 2011 Act 425 Agreement was invalid, for failure to comply with Act 425. *Id.* A little over two weeks later, on November 17, 2011, the SBC held its first hearing on Plaintiffs' 2011 annexation petition, that being the legal sufficiency hearing. **Tab B** (minutes of November 17, 2011 SBC meeting). As stated in the minutes of that meeting, the SBC found that the annexation petition was legally sufficient (i.e., that it met the minimum requirements for consideration), and decided to take evidence on the validity of the Act 425 Agreement "following a review of evidence at the public hearing," which was scheduled for January 9, 2012. *Id.*

The next day, on November 18, 2011, the Townships filed a joint motion for summary disposition in *TeriDee I*, arguing that, pursuant to the Court of Appeals' decision in *Casco Twp v State Boundary Comm'n*, 243 Mich App 392; 622 NW2d 332 (2000), the SBC had the authority to decide the validity of the Act 425 Agreement, and that the Court should therefore dismiss the lawsuit under the primary jurisdiction doctrine, or based on Plaintiffs' failure to exhaust their administrative remedies. A hearing on the Townships' motion was held on December 12, 2011, after which the Court ruled from bench, stating that *TeriDee I* would be dismissed on the reasoning of the *Casco Twp* case and in deference to the pending SBC proceedings. **Tab C**, 12/12/11 Tr. at pp. 30-32. A final order dismissing *TeriDee I* was entered by the Court on December 28, 2012. **Tab D**.

Plaintiffs did not appeal the Court's *TeriDee I* decision. Instead, the validity of the 2011 Act 425 Agreement was considered by the SBC, in conjunction with the SBC's consideration of Plaintiffs' 2011 annexation petition. Ultimately, on August 8, 2012, following the completion of the SBC's informal adjudicative process, the SBC issued its Summary of Proceedings, Findings of Fact and Conclusion of Law, through which it (a) decided that the 2011 Act 425 Agreement was invalid, and (b) recommended that the annexation petition be denied. **Tab E**. The SBC's decision that the 2011 Act 425 Agreement was invalid was based on a factual finding that the Agreement "was not

being used to promote economic development.” *Id.* at p. 2, finding of fact #6. In support of that finding, the SBC made five discrete conclusions, as follows:

- “a. No clearly defined economic development project is named.
- “b. Clam Lake received no benefit from the agreement, i.e., there is no revenue sharing included.
- “c. Copies of emails obtained by the petitioner through a [FOIA] request . . . between Clam Lake Township and the Charter Township of Haring discuss the 425 Agreement as a means to deny the Commission jurisdiction over the proposed annexation.
- “d. Concern over the Charter Township of Haring’s ability to effectively and economically provide the defined public services. No cost study was proven to analyze the differential of connecting the area to public services from the Charter Township of Haring versus connecting to services from the City of Cadillac.
- “e. The timing of the Act 425 Agreement. The agreement was executed more than three months after the annexation request was filed.” *Id.* at p. 3, finding of fact 6a through 6e.

Denial of the annexation petition became final on October 3, 2012, when the SBC’s recommendation was approved and adopted by the Director of the Department of Licensing and Regulatory Affairs (“LARA”), by way of a Final Decision and Order. **Tab F.** Plaintiffs did not appeal the denial of their 2011 annexation petition.

B. The Current Lawsuit: *TeriDee I* Redux

As noted above, the present lawsuit (*TeriDee II*) is a substantial repeat of *TeriDee I*. As explained below, it arises from many similar background facts, and from the same juxtaposition of concurrent administrative and judicial authority.

1. *TeriDee II*: Background Facts

In setting the stage for the events that transpired from October 2012 until now, it is important to remember that the SBC and the Director of LARA had already determined that Plaintiffs’ property should *not* be annexed into the City of Cadillac. **Tab F.** In that predicate context, a series of events

thereafter unfolded that led Clam Lake and Haring to enter another Act 425 Agreement for the purpose of facilitating the sharing of utility services that would promote economic development.

Most significantly, any contingency that had previously existed, with respect to the ability of Haring to provide wastewater services to Clam Lake, was eliminated in 2013. Specifically, the following events occurred in the 2012 to 2013 timeframe:

- All financing for the new Haring wastewater treatment plant (“WWTP”) was approved. In addition to the \$1 million letter of credit that Wal-Mart had previously issued (through Chase Bank) to help finance the construction of the new WWTP (**Tab G**), Haring was approved for a Rural Development (“RD”) grant in the amount of \$595,000, and a low-interest RD loan in the amount of \$2,931,000 (**Tab H**), thus providing the total sum of \$4,526,000 needed to construct the new WWTP.
- Haring submitted its administratively complete application for an NPDES permit for the new WWTP, and said permit was subsequently issued. **Tab I**.
- After the Haring Board published, on March 26, 2013, its Notice of Intent to issue bonds for repayment of the RD loan, the 45-day referendum period expired with no petition having been filed, thus allowing Haring to issue bonds and proceed with construction. **Tab J**.

In short, the Haring WWTP became a “sure thing” in 2013. Given this new development, and given the City of Cadillac’s rigid adherence to a policy of refusing wastewater service to the surrounding townships without permanent acquisition of the served township lands¹, the Townships approved a second Act 425 Agreement on May 8, 2013 (covering Plaintiffs’ property and also some adjacent lands – the “Transferred Area”), through which Haring water and wastewater services are *required* to be extended to Plaintiffs’ property to facilitate an economic development project thereon. **Tab K**, Act 425 Agreement, Art. I, §§ 3 and 4(a). And, for the longer term, the Townships also included provisions in the 2013 Act 425 Agreement to facilitate the extension of Haring sewer services to the Clam Lake Downtown Development Authority District, to also facilitate economic development on those lands. *Id.* at Art. I, §4(b).

¹ The Court is already well aware of the City’s policy on this subject, from its experience with Case No. 08-20967-CK.

Also, being mindful of the SBC's findings with respect to the 2011 Act 425 Agreement (**Tab E** at p. 3, finding of fact 6a through 6e), the Townships ensured that all concerns the SBC had about the content of the 2011 Act 425 Agreement were remedied in the 2013 Agreement:

- There is a clearly defined economic development project. Not only are Haring water and wastewater services *required* to be extended to the Transferred Area (**Tab K**, Act 425 Agreement, Art. I, §§ 3 and 4(a)), the 2013 Agreement also provides that the owners of the undeveloped portion of the Transferred Area (i.e., Plaintiffs) may seek rezoning to a mixed-use commercial/residential planned unit development ("PUD") district, to allow commercial development at the intersection of Highway M-55 and Highway U.S.-131.²
- Clam Lake will receive financial benefit under the Agreement. The Townships have agreed that when Haring utilities are extended into the Transferred Area, they will amend the Agreement to share the revenues from those utilities, to enable Clam Lake to pay and finance the cost of constructing wastewater and water infrastructure, and the cost of providing wastewater services and public water services to the Transferred Area. *Id.* at Art II.
- Haring Will Effectively and Economically Provide Utility Services. As noted above, the 2013 Agreement *requires* that Haring sewer and water services be extended to the Transferred Area. And the Townships have performed a cost study to show that Haring sewer and water serves can be provided to the Transferred Area at a cost that is *less* than the cost of providing City sewer and water services to the Transferred Area.
- The timing of the 2013 Agreement was proper. The Act 425 Agreement was approved by each Township on May 8, 2013, at a time when no annexation petition had even been filed with the SBC, covering the Transferred Area. Moreover, it was approved at a time when the SBC had already determined – just eight months earlier – that Plaintiffs' property should *not* be annexed into the City.

The Townships' 2013 Act 425 Agreement became effective on June 10, 2013, when it was signed by each Township and filed with the County Clerk and Secretary of State. **Tab K.**

2. *TeriDee II: Concurrent Administrative and Judicial Proceedings*

Despite having prior knowledge of the 2013 Act 425 Agreement (*see Tab L*), Plaintiffs invoked the SBC's jurisdiction by filing a second annexation petition on June 5, 2013, covering their same property. Pls' Compl at ¶36. Upon learning of this new filing, the Townships promptly filed a responsive pleading with the SBC (**Tab M**), giving notice that the annexation petition was defective

² The PUD zoning regulations are discussed in further detail below, in Section C.

because the subject property had been transferred to Haring under the 2013 Act 425 Agreement, and that the annexation petition was therefore legally insufficient, as being barred by MCL 124.29.³

Similar to the 2011-2012 annexation proceedings, the SBC again seized jurisdiction over the question of the validity of the Townships' Act 425 Agreement. This was first done by way of a staff memo on July 17, 2013, which stated, "OSLR recommends that the Boundary Commission examine the validity of [the Act 425] agreement following a review of evidence to be provided at a public hearing in Wexford County if the petition is found to be sufficient." **Tab N**. Then again, at the legal sufficiency hearing that was held on August 13, 2013, an SBC Commissioner confirmed that the SBC would take evidence on the validity of the Act 425 Agreement at the public hearing on the annexation petition, which was scheduled for October 23, 2013. **Tab O** (minutes of 08/13/13 SBC mtg. at p. 3). Plaintiffs' own legal counsel stated that it would address the validity of the Act 425 Agreement at the SBC public hearing. *Id.*

At the August 13, 2013 legal sufficiency hearing, counsel for Plaintiffs also announced that they had filed this lawsuit in this Court (*TeriDee II*) earlier that same day, challenging the validity of the Townships' Act 425 Agreement. *Id.* at p. 2. In attempting to distinguish *TeriDee II* from *TeriDee I*, Plaintiffs' legal counsel ascribed some significance to the fact that it had been filed before (a few hours before) the legal sufficiency hearing. On that point, however, the Townships mention that this is not different than *TeriDee I*. As demonstrated above, the Complaint in *TeriDee I* was filed on November 1, 2011 – 16 days *before* the SBC's legal sufficiency that was held on November 17, 2011. Thus, in both *TeriDee I* and *TeriDee II*, the filing of the Complaint preceded the SBC's legal sufficiency hearing; it's just that the Complaint was filed a couple weeks later in this lawsuit.

So it is, therefore, that the Court and the SBC again have concurrent jurisdiction over the

³ "While a contract under this act is in effect, another method of annexation or transfer shall not take place for any portion of an area transferred under the contract."

same issue – the validity of the Townships’ Act 425 Agreement. The one distinguishing feature is that Plaintiffs have now added a second count to their Complaint in *TeriDee II*, alleging that the Act 425 Agreement is invalid for the additional reason that it allegedly divests Haring, by contract, of its legislative authority to zone and rezone property. Pls’ Compl at ¶¶57-65. Because of this new claim, the Townships comment below on the zoning provisions of the Act 425 Agreement.

C. Zoning Provisions of the 2013 Act 425 Agreement

It is accurate to say that the 2013 Act 425 Agreement contains certain provisions by which the owners of the undeveloped portion of the Transferred Area (i.e., Plaintiffs) are able to seek rezoning to a new mixed-use commercial/residential planned unit development (“PUD”) district, to allow commercial development at the intersection of Highway M-55 and Highway U.S.-131. **Tab K**, Act 425 Agreement, Art. I, §§ 3 and 4(a). However, Plaintiffs’ Complaint makes certain erroneous allegations about the content and effect of the zoning provisions of the Agreement, as follows:

1. ¶61 of the Complaint alleges that the Agreement requires Haring to rezone Plaintiffs’ property in compliance with the PUD regulations stated in the agreement.

This allegation is incorrect. The Agreement merely requires that Haring adopt the specified mixed-use PUD regulations into its zoning ordinance. Plaintiffs’ property would be rezoned in accordance with the new mixed-use PUD regulations only if Plaintiffs applied for rezoning of their land to the new mixed-use PUD District. *See Tab K*, Act 425 Agreement at Art. I, §6.a.2 (“The balance of the Transferred Area that is currently undeveloped shall be rezoned, **upon application of the property** owner(s), to a planned unit development (“PUD”) district that permits mixed commercial/residential use.”) [Emphasis added]. In other words, it is up to Plaintiffs whether their property is rezoned to the new mixed-use PUD District.

2. ¶63 of the Complaint alleges that the Agreement binds future Haring Township Boards to the rezoning requirements of the Agreement.

This allegation is incorrect. After Haring has adopted the new mixed-use PUD zoning

regulations into its zoning ordinance, the zoning of Plaintiffs' property becomes subject to any future amendments to the Haring zoning ordinance:

"b. Haring will use reasonable efforts to adopt the above-described zoning provisions for the Transferred area within one year of the effective date of this Agreement, so that the property owner(s) of the undeveloped portion of the Transferred Area are able to make application to Haring for PUD approval reasonably in advance of the date when public wastewater and public water are scheduled to be extended to the Transferred Area, in the spring of 2015.

"c. After such amendments to the Haring zoning ordinance, and for the Duration of the Conditional Transfer, **the Transferred Area shall be subject to Haring's Zoning Ordinance** and building codes as then in effect or **as subsequently amended.**" See **Tab K**, Act 425 Agreement at Art. I, §6.b and c. [Emphasis added].

Thus, for the duration of the Agreement, current and future Haring Boards may amend the zoning for Plaintiffs' property, to wit, by making it subject to "subsequent[] amend[ments]."

3. ¶63 of the Complaint alleges that the Agreement binds the current Haring Township Board to the rezoning requirements of the Agreement

As a matter of implementation of the Agreement, this allegation is also incorrect. Shortly after the Agreement took effect, Haring commenced the legislative process of reviewing the PUD regulations of the Agreement, and thereafter revised them in accordance with the Haring Board's legislative discretion. The revised PUD regulations are now being incorporated into an amended form of the Agreement. Specifically, the following legislative actions were undertaken by Haring:

- The Haring Planning Commission ("PC") performed a preliminary review of the PUD regulations at a meeting on July 16, 2013 (**Tab P**), during which the PC suggested several changes, including some changes that had been requested by Plaintiff and their counsel, who attended the meeting (*id.*). Most significantly, the Haring PC selected the uses to be allowed in the new mixed-use PUD District; this subject is not even addressed in the Act 425 Agreement.
- The Haring PC considered a revised draft (Alternate Draft No. 2) (**Tab Q**) of the PUD regulations at a meeting on July 30, 2013 (**Tab R**), during which the PC requested further revisions, and then scheduled the further revised version for public hearing.

- The Haring PC conducted a public hearing on Alternate Draft No. 3 (**Tab S**) on August 20, 2013, and recommended that the revised version be adopted for incorporation in the Act 425 Agreement. **Tab T**.
- On August 26, 2013, the Haring Board accepted Alternate Draft No. 3, on first reading. **Tab U**.
- On September 9, 2013, the Haring Board adopted Alternate Draft No. 3, on second reading. **Tab V**, Affidavit of Robert Scarbrough at ¶3.
- On September 9, 2013, the Haring Board held a public hearing on an amended Act 425 Agreement that would incorporate the alternate PUD regulations that it had legislatively approved. *Id.* at ¶4. The amendment was approved that same evening. *Id.* at ¶5.
- The Clam Lake Board is scheduled, for September 18, 2013, to hold a public hearing on an amended Act 425 Agreement that would incorporate the alternate PUD regulations that were legislatively approved by the Haring Board. **Tab W**.
- Based on the September 18 date of Clam Lake's public hearing, the amended Act 425 Agreement is scheduled to be executed and filed on October 21, 2013.

Thus, by the time the Townships' motion is brought before the Court for hearing on October 28, 2013, the Act 425 Agreement will have been amended to incorporate revised PUD regulations that have undergone the legislative process of being reviewed/revised by the Haring Planning Commission and adopted by the Haring Township Board.⁴

ARGUMENTS

I. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED IN DEFERENCE TO THE PENDING SBC PROCEEDINGS.

Just as the Court previously held in *TeriDee I*, disposition of this case is controlled by the Court of Appeals' decision in *Casco Twp v State Boundary Comm'n*, 243 Mich App 392; 622 NW2d 332 (2000). The *Casco Twp* case involved a situation where (like here) there were competing Act 425 agreements and an annexation petition covering the same lands. In considering whether to approve the *Casco Twp* annexation petition, the SBC decided that the townships' Act 425

⁴ The Townships will file a supplemental brief prior to the hearing date on the Townships' motion, to provide the Court with documentation of the final steps of the Act 425 Agreement amendment process.

agreements were invalid because they were entered into for the sole purpose of interfering with a proposed annexation, not for an economic development project. After determining that the Act 425 agreements were invalid, the SBC in *Casco Twp* held that the subject property was not immune from annexation under MCL 124.29, and then approved the annexation petition. Implicit in the SBC's decision was its predicate determination that it had jurisdiction and authority to determine the validity of an Act 425 agreement and to set aside any such agreement that it deemed to be invalid.

On appeal in *Casco Twp*, the Court of Appeals held that the SBC was the proper agency to make this predicate decision, and the SBC had the jurisdiction and authority to do so, at least in circumstances where there is a competing annexation petition and an Act 425 agreement covering the same lands. *Id.* at 397-400.

Just as in *Casco Twp*, this case involves a pending annexation case before the SBC, and an Act 425 Agreement that covers the property proposed to be annexed. By the time the Townships' motion has been presented to the Court on oral argument, the SBC will have already conducted a public hearing (on October 23, 2013) for the purpose of taking evidence on the validity of the Act 425 Agreement. As demonstrated below, the controlling decision in *Casco Twp* requires that Plaintiffs' complaint be dismissed in these circumstances because (1) the SBC has primary jurisdiction to determine whether the Act 425 Agreement is valid, and (2) Plaintiffs have failed to exhaust their administrative remedies before the SBC.

A. Plaintiffs' Complaint Should Be Dismissed Under the Doctrine of Primary Jurisdiction

Plaintiffs' claims about the validity of the Act 425 Agreement are already being adjudicated by the SBC in conjunction with the pending administrative proceedings commenced by Plaintiffs' own annexation petition, and so Plaintiffs' Complaint should be dismissed under the doctrine of primary jurisdiction, just as the Court already held in *TeriDee I.*

The doctrine of primary jurisdiction applies “whenever enforcement of [Plaintiffs’] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 206; 631 NW2d 733 (2001). In *Rinaldo’s Construction Company Corp v Michigan Bell Telephone Co*, 454 Mich 65; 559 NW2d 647 (1997), our Supreme Court provided a detailed explanation of the doctrine of primary jurisdiction:

Primary jurisdiction “is a concept of judicial deference and discretion.” LeDuc, Michigan Administrative Law, § 10:43, p 70. The doctrine exists as a “recognition of the need for orderly and sensible coordination of the work of agencies and of courts.” *White Lake Improvement Ass’n v. City of Whitehall*, 22 Mich. App. 262, 282, 177 NW2d 473 (1970). In *White Lake*, the Court of Appeals correctly noted that “[t]he doctrine of primary jurisdiction does not preclude civil litigation; it merely suspends court action.” *Id.* at 271, 177 NW2d 473. Thus, LeDuc notes, “[p]rimary jurisdiction is not a matter of whether there will be judicial involvement in resolving issues, but rather of when it will occur and where the process will start.” *Id.* at § 10:44, p 73. A court of general jurisdiction considers the doctrine of primary jurisdiction “whenever there is concurrent original subject matter jurisdiction regarding a disputed issue in both a court and an administrative agency.” *Id.*, § 10:43 at 70.

In *Attorney General v. Diamond Mortgage Co.*, 414 Mich. 603, 613, 327 N.W.2d 805 (1982), we applied the United States Supreme Court’s definition of the doctrine from *United States v. Western Pac. R. Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956):

“‘Primary jurisdiction’ . . . applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.”

The Court observed, “No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.” *Id.* at 64, 77 S.Ct. at 165. [*Rinaldo’s*, *supra* at 70-71.]

Three major purposes govern the analysis when a court is deciding whether to defer to an administrative agency under the primary jurisdiction doctrine. First, a court should consider “the

extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue." Second, the court should consider the "need for uniform resolution of the issue." Third, the court should consider "the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities." *Id.* at 71 (quoting Davis & Pierce, 2 Administrative Law (3d ed), § 14.1, p. 272). Courts are to weigh these considerations and defer to administrative agencies when the case is more appropriately decided there. *Id.* at 72.

Plaintiffs' Complaint should be dismissed under the doctrine of primary jurisdiction because their claims fit squarely within the factors that justify the doctrine's application. Indeed, the *Casco Twp* decision reads almost like a treatise for proper application of the doctrine in this context, where there is an Act 425 agreement and a competing annexation petition covering the same property:

"The legislative purpose behind the State Boundary Commission was to establish an independent authority with 'broad powers concerning annexations' and to allow annexations to take place for the general benefit of the areas concerned, instead of for the private benefit of individuals. *Owosso Twp. v. Owosso*, 385 Mich. 587, 590, 189 NW2d 421 (1971). Subsection 9(2) of the Home Rule City Act, 1909 PA 279, M.C.L. § 117.9(2); MSA 5.2088(2), provides that the commission has the power to determine 'the validity of the petition or resolution' concerning annexation and also recognizes the commission's duties concerning 'processing and approving, denying, or revising a petition or resolution for annexation . . .' M.C.L. § 123.1011a; MSA 5.2242(11a), setting forth procedures, provides, 'The commission shall have jurisdiction over petitions or resolutions for annexation as provided in [MCL 117.9; MSA 5.2088].'

"MCL 124.29; MSA 5.4087(29) states that where an Act 425 agreement 'is in effect, another method of annexation or transfer shall not take place for any portion of an area transferred under the contract.' Act 425 provides a mechanism through which "local units may conditionally transfer property" in a manner 'controlled by a written contract agreed to by the affected local units.' *See* M.C.L. § 124.22(1); MSA 5.4087(22)(1). MCL 124.30; MSA 5.4087(30) in turn provides that a duly filed Act 425 agreement 'is prima facie evidence of the conditional transfer.' Act 425 agreements thus allow municipalities conditionally to revise their borders without recourse to, or interference from, the commission.

"At issue is the commission's role in determining whether an Act 425 agreement is valid for purposes of deciding whether the agreement bars the commission from entertaining a petition for annexation concerning the same land. The plain wording of M.C.L. § 124.29; MSA 5.4087(29), provides that 'a contract under this act' presently

‘in effect’ bars other forms of ‘annexation or transfer’ of the affected territory. This language expressly requires an Act 425 agreement that is ‘in effect’ and, therefore, necessitates a valid agreement. Consequently, this statutory bar to the commission’s consideration of an annexation petition requires an agreement that fulfills the statutory criteria, rather than a fictional agreement intended only to deprive the commission of jurisdiction.

“The townships argue that either the circuit court should review the issue of jurisdiction de novo or that the circuit court should have sole jurisdiction to determine the validity of an Act 425 agreement. According to the townships, any document purporting to be an Act 425 agreement, once signed and filed according to the specified procedure, absolutely bars any action on the part of the commission concerning the same territory, without regard to the substance of the agreement. We disagree. **In light of the broad grant of statutory authority to the commission over matters relating to the establishment of boundaries and annexations, we hold that the commission had the authority and jurisdiction to decide the validity of the Act 425 agreements. Logic dictates that the commission had the authority to consider the validity of two agreements that, if valid, would have barred its authority to process, approve, deny, or revise a petition or resolution for annexation. The commission would not otherwise have been able to perform its function of resolving the petition.”** *Casco Twp* at 397-400 [emphasis added].

The SBC has the statutory power to adjudicate Plaintiffs’ annexation petition. Likewise, under *Casco Twp*, the SBC also has the authority to consider the validity of the Act 425 Agreement which, if deemed valid, would bar the SBC’s authority to process or approve Plaintiffs’ annexation petition. Plaintiffs thus have the opportunity to have their claims about the Act 425 Agreement decided by the SBC. Determination of the validity of an Act 425 Agreement is a necessary step in the SBC’s annexation proceedings, as the SBC has already decided in this case. **Tabs N and O.** The SBC frequently hears testimony and other evidence regarding Act 425 agreements, and has already done so in this case. The SBC is not only capable of determining the validity of Act 425 agreements, but is uniquely suited to do so, since such determinations must be made in every annexation case involving an Act 425 agreement. Moreover, application of primary jurisdiction in this case is particularly appropriate, given that the SBC made prior findings of fact about the alleged deficiencies in the 2011 Act 425 Agreement (**Tab E**), and so is uniquely situated to evaluate whether the Townships have remedied these alleged deficiencies in their 2013 Agreement. Logically, the

SBC should make both sets of decisions, to maintain consistency in reasoning.

And while it is true that this Court has concurrent jurisdiction, and so *could* decide Plaintiffs' claims, the Court should refrain from doing so, because this would directly conflict with the principles that underlie the primary jurisdiction doctrine. If the Court were to assert jurisdiction, its decision could: (1) contravene the authority of the SBC and potentially lead to an inconsistent result; (2) undermine the SBC's jurisdiction over annexation petitions when an Act 425 agreement is involved; (3) unnecessarily spend judicial resources to decide matters not commonly before the circuit court; and (4) inefficiently split the essentially interrelated proceedings involving the annexation petition and the Act 425 Agreement between the SBC and the circuit court. This should be consciously avoided by the Court, by invocation of the doctrine.

Where the doctrine applies, "primary jurisdiction requires dismissal of [the] plaintiff's claim." *Rinaldo's*, *supra* at 67. Where the administrative agency can "grant the relief prayed" for, as the SBC can here, the Court should dismiss the action. *Grevers v Michigan Bell Tel Co*, 18 Mich App 422, 425; 171 NW2d 476 (1969). *See also White Lake Imp Ass'n v City of Whitehall*, 22 Mich App 262, 285; 177 NW2d 473 (1970). The Court should effectuate that same result here, and thus grant the Townships' motion for summary disposition under MCR 2.116(C)(8).⁵

B. Plaintiffs' Complaint Should Be Dismissed for Failure to Exhaust⁶

Plaintiffs' Complaint could also be dismissed on the basis of the exhaustion doctrine. The essential role of the exhaustion doctrine is to preserve the relative functions of agencies and the courts. *See, e.g., Compton Sand & Gravel Co v Dryden Twp*, 125 Mich App 383; 336 NW2d 810 (1983). Plaintiffs' premature Complaint contravenes the policy considerations that support the

⁵ The Michigan courts have been less than precise about whether primary jurisdiction is to be raised under subrule (C)(4) or (C)(8), but no error arises either way, because the same review standards will apply. *Travelers*, *supra* at 206, n18.

⁶ The Court seemingly rejected the applicability of the exhaustion doctrine in *TeriDee I*, and so the Townships mention it only very briefly here, in order to preserve the argument for possible appeal.

doctrine of exhaustion, because: (1) this suit disrupts the SBC's otherwise cohesive administrative system for adjudicating boundary adjustment matters; (2) this suit is brought before a full factual record could be developed before the SBC; (3) resolution of the issues raised in this suit requires the accumulated administrative competence of the SBC, and these issues have been entrusted by the Legislature to the SBC's discretion by statute; and (4) the issues raised in this suit could be successfully resolved by the SBC, thereby precluding the need for judicial review. Based on these factors, the Court should dismiss Plaintiffs' complaint, and require Plaintiffs to exhaust their remedies before the SBC, before seeking judicial review under MCL 24.303.

C. Count II Is Equally Subject To Dismissal Under *Casco Twp*

Count I of Plaintiffs' new Complaint is virtually identical to Count I of their prior Complaint in *TeriDee I*, and so is clearly subject to dismissal on the same basis the Court already held in *TeriDee I*. Indeed, principles of collateral estoppel probably compel the Court to dismiss Count I. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). That said, Count II is admittedly a new type of claim, but should also be dismissed on the basis of the *Casco Twp* decision and the primary jurisdiction doctrine, as demonstrated below.

Count II raises the issue of whether the zoning provisions of the Act 425 Agreement unlawfully contract-away the legislative zoning authority of Haring. This is a claim over which the Court *could* exercise jurisdiction, but once again, the claim goes to the heart of whether the Act 425 Agreement complies with Act 425, and so is also squarely within the SBC's jurisdiction. In that regard, Section 6(c) of Act 425 expressly states that a contract for the conditional transfer of territory may include a provision providing for "the adoption of ordinances and their enforcement." MCL 124.26(c). In other words, Act 425 expressly allows the parties to an Act 425 agreement to contractually bind themselves to the adoption of ordinances that will apply to the territory being transferred. Thus, the SBC, in considering the validity of the Townships' Act 425 Agreement, has

the authority to determine whether the zoning provisions of the Agreement reflect the type of ordinance provisions that are contemplated by MCL 124.26(c). Because the SBC is possessed of such authority, the primary jurisdiction doctrine fully applies for the same reasons discussed above, and Count II should be dismissed pursuant to MCR 2.116(C)(8).

II. ALTERNATIVELY, COUNT II SHOULD BE DISMISSED ON ITS MERITS

If the Court declines to apply the primary jurisdiction doctrine to Count II, the Court should nonetheless dismiss Count II on its merits because the zoning provisions of the Act 425 Agreement (1) are authorized by law, and (2) do not contractually bind the legislative hands of Haring, either on their face or in their actual application.⁷

A. The Zoning Provisions of the Agreement Are Legislatively Authorized

Count II is predicated on the allegation that a municipality may *never* enter a contract that restricts the exercise of its legislative zoning authority. *See* Pls' Compl at ¶¶58 and 60. This is incorrect. Contractual rezoning may be authorized, and has been authorized, by the Legislature in several instances. For example, two species of contract rezoning are authorized under the Michigan Zoning Enabling Act ("MZEA"), MCL 125.3101, *et seq.* The first species appears at MCL 125.3405, which authorizes a process by which a landowner can offer conditions as part of a rezoning request, and if the rezoning request is granted, the conditions are thereafter binding on the municipality, and cannot be altered. *See* MCL 125.3405(3). The second species appears at MCL 125.3503 and 125.3504, which pertain to the PUD rezoning process. A PUD may be approved by rezoning (MCL 125.3503(7)), and conditions may be imposed on the rezoning when this occurs (MCL 125.3504(4)). The consequence of the PUD process is that the rezoning conditions become contractually binding on the approving authority, and cannot thereafter be altered, except upon the

⁷ As a predicate matter, the Townships point out a fatal defect in Count II. The Act 425 Agreement is severable (Tab K, Agreement at Art. V), and so even if the zoning provisions were deemed unlawful, this would not invalidate the Agreement. It would merely mean that Haring would rezone Plaintiffs' property outside the context of the Agreement.

mutual consent of the landowner and the approving authority (MCL 125.3504(5)). It should be pointed out that both the conditional rezoning process and PUD rezoning process have been recognized as valid forms of contractual rezoning by the Michigan courts. *See Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239; 792 NW2d 781 (2010) (enforcing PUD rezoning agreement as a binding contract); *Wesley & Velting, LLC v Village of Caledonia* (unpublished), No. 278264 (Mich Ct App, Oct 2, 2008 (Tab X) (“MCL 125.3405, by its plain language, provides a mechanism for contractual zoning . . .”).

So, having set the stage with the predicate principle that certain forms of contract rezoning may, as a matter of law, be legislatively authorized, we can turn our attention to Section 6(c) of Act 425, which, as noted above, expressly states that a contract for the conditional transfer of territory may include a provision providing for “the adoption of ordinances and their enforcement.” MCL 124.26(c). In other words, Act 425 expressly allows the parties to an Act 425 agreement to contractually bind themselves to the adoption of certain *zoning* ordinances⁸ that will apply to the property being transferred. This is only logical, because Act 425 agreements often provide (as here) for the reversion of the transferred property back to the transferor municipality, upon conclusion of the agreement. And by restricting the zoning of the property by contract, this ensures that the transferred property will be developed in a manner contemplated by the transferor municipality when it ultimately reverts back to the transferor’s jurisdiction.

Principles of statutory construction compel this same conclusion. We already know that the MZEA authorizes two forms of contract rezoning, and we also know that Section 6(c) of Act 425 expressly authorizes two municipalities to agree to the adoption of an ordinance, including a zoning ordinance, by contract. Thus, the two statutes are *in pari materia*, insofar as contract rezoning is

⁸ The Court will note that MCL 124.26(c) places no restriction on the types of ordinances to which the parties may agree by contract. It simply uses the plain and unrestricted term “ordinances,” which encompasses a zoning ordinance.

concerned – they both relate to this same subject matter, but from two slightly different angles (i.e., municipality-to-landowner contracting under the MZEA; municipality-to-municipality contracting under Act 425). *Mich Electric Coop Ass’n v MPSC*, 267 Mich App 608, 616; 705 NW2d 709 (2005) (“Statutes that relate to the same subject or share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another.”); *People v Brantley*, 296 Mich App 546, 558; 823 NW2d 290 (2012) (such statutes must be read as a “unified whole.”).

Thus, when construing the MZEA and Act 425 in this context, they must be read together as one statute, to produce a “harmonious whole.” *World Book, Inc v Dep’t of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999). If the two statutes lend themselves to a construction that avoids conflict, then that construction should control. *People v Webb*, 458 Mich 265, 273-75; 580 NW2d 884 (1998). Applying these principles, the necessary conclusion is that Section 6(c) of Act 425 authorizes two municipalities to contract for certain zoning provisions for the transferred land, by way of an Act 425 agreement. This is consistent with reading Act 425 as a harmonious whole with the MZEA, through which the Legislature has expressly authorized contractual rezoning in appropriate circumstances. And one of those appropriate circumstances clearly includes when property is transferred back-and-forth between two municipalities under an Act 425 contract, because both municipalities necessarily have a compelling interest in the zoning, since the land in question will lie in each of their respective jurisdictions for a defined period of time. For this reason, the Court should dismiss Count II under MCR 2.116(C)(8), for failure to state a claim for relief.

B. The Zoning Provisions Of The Agreement Do Not Contractually Bind The Current Or Future Haring Boards

Count II fails for the additional reason that the zoning provisions of the Act 425 Agreement do not contractually bind the legislative hands of the current or future Haring Boards, either on their face or in their actual application.

1. On Its Face, The Agreement Does Not Bind Haring

As demonstrated in Section C of the Statements of Facts, the Act 425 Agreement merely requires that Haring adopt the specified mixed-use PUD regulations into its zoning ordinance. Plaintiffs' property would be rezoned in accordance with the new mixed-use PUD regulations only if Plaintiffs applied for rezoning of their land to the new mixed-use PUD District. *See Tab K*, Act 425 Agreement at Art. I, §6.a.2 ("The balance of the Transferred Area that is currently undeveloped shall be rezoned, **upon application of the property owner(s)**, to a planned unit development ("PUD") district that permits mixed commercial/residential use.") [Emphasis added]. In other words, it is up to Plaintiffs whether their property is rezoned to the new mixed-use PUD District, and so the current Haring Board is not contractually bound.

With respect to current and future Haring Boards, Plaintiffs are also incorrect when they allege that the Agreement binds Haring Boards to the rezoning requirements of the Agreement. To the contrary, under the express terms of the Agreement, after Haring has adopted the new mixed-use PUD zoning regulations into its zoning ordinance, the zoning of Plaintiffs' property becomes subject to any **future amendments** to the Haring zoning ordinance:

"b. Haring will use reasonable efforts to adopt the above-described zoning provisions for the Transferred area within one year of the effective date of this Agreement, so that the property owner(s) of the undeveloped portion of the Transferred Area are able to make application to Haring for PUD approval reasonably in advance of the date when public wastewater and public water are scheduled to be extended to the Transferred Area, in the spring of 2015.

"c. After such amendments to the Haring zoning ordinance, and for the Duration of the Conditional Transfer, **the Transferred Area shall be subject to Haring's Zoning Ordinance** and building codes as then in effect or **as subsequently amended.**" *See Tab K*, Act 425 Agreement at Art. I, §6.b and c. [Emphasis added].

Thus, for the duration of the Agreement, the current and future Haring Boards are expressly permitted to amend the zoning for Plaintiffs' property, to wit, by making it subject to any

“subsequent[] amend[ments].” Since the Agreement, on its face, binds neither the current nor future Haring Boards with respect to the zoning of Plaintiffs’ property, the Townships are entitled to summary disposition on Count II, pursuant to MCR 2.116(C)(8).

2. As Applied, The Agreement has Not Bound Haring

As demonstrated in Section C of the Statements of Facts, the actual application of the Agreement demonstrates that Haring has not had its legislative authority constrained by the Agreement. Within a month after the Agreement became effective, Haring put into action its own, unfettered legislative process of (a) reviewing the Agreement’s PUD regulations; (b) revising the regulations per Haring’s own preferences in many respects (including by specifying the permitted uses in the mixed use PUD District – a subject not even addressed by the Agreement – and by making some revisions requested by Plaintiffs); (c) holding a public hearing on the revised regulations; (d) adopting the revised regulations into the Haring zoning ordinance; and then (e) incorporating those amendments into an amended Act 425 Agreement. These undisputed facts show that Haring exercised its own legislative discretion in determining the final content of the mixed-use PUD District to which Plaintiffs can seek rezoning, and so there is no merit to Count II whatsoever. On this additional ground, Count II should be dismissed pursuant to MCR 2.116(C)(10).

CONCLUSION AND REQUEST FOR RELIEF

For all of the reasons stated herein, the Townships respectfully request that this Honorable Court grant the Townships summary disposition pursuant to MCR 2.116(C)(8) and/or (C)(10)

Respectfully submitted,

MIKA MEYERS BECKETT & JONES ^{PLC}
Attorneys for Defendants

Dated: September 10, 2013

By: 

Ronald M. Redick (P61122)
900 Monroe Avenue, NW
Grand Rapids, MI 49503

TAB 2

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
STATE BOUNDARY COMMISSION

In the matter of:

State Boundary Commission
Docket #11-AP-2

The proposed annexation of land
in Clam Lake Township to the City of Cadillac,
Wexford County.

SUMMARY OF PROCEEDINGS,
FINDINGS OF FACT AND CONCLUSIONS OF LAW

SUMMARY OF PROCEEDINGS

1. On June 3, 2011, a petition was filed with the State Boundary Commission by TeriDee, L.L.C. requesting the annexation of land in Clam Lake Township to the City of Cadillac. The map and legal description of the area proposed for annexation are included as Exhibit A.
2. On November 17, 2011, the State Boundary Commission found by a vote of 4-0 that the annexation petition was legally sufficient and scheduled a public hearing to be held on January 9, 2012.
3. On January 9, 2012, the Commission held a public hearing at the Cadillac City Hall. At the meeting, the Commission heard comment from the involved parties and the public on the merits of the proposed annexation and the 425 Agreement. Following the hearing, a 30-day public comment period was opened and expired February 8, 2012. Following the 30-day public comment period, a 7-day rebuttal period opened March 12, 2012 and expired March 19, 2012.
4. On June 13, 2012, the State Boundary Commission unanimously voted to recommend to the Director of the Department of Licensing and Regulatory Affairs that he find the 1984 PA 425, Conditional Transfer Agreement between the Charter Township of Haring and Clam Lake Township that was filed with the Michigan Secretary of State on October 20, 2011 invalid. The Commission believes that the 425 Agreement was created solely as a means to bar the annexation and not as a means of promoting economic development.

5. On June 13, 2012, the State Boundary Commission voted 3-2 to recommend to the Director of the Department of Licensing and Regulatory Affairs that he deny the petition for annexation.
6. On August 8, 2012, the Commission voted unanimously to adopt the draft Minutes for the June 13, 2012 meeting reflecting the Commissioners decisions on this case, and the draft Summary of Proceedings, Findings of Fact, and Conclusions of Law recommending that the Director of the Department of Licensing and Regulatory Affairs sign an order denying the proposed annexation of land in Clam Lake Township to the City of Cadillac.

FINDINGS OF FACT

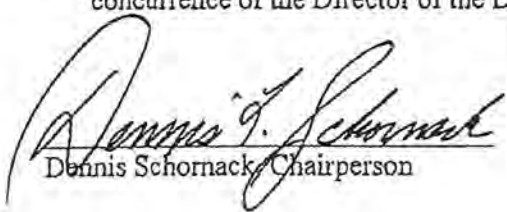
1. The proposed area for annexation is located at the interchange of state highway M-55 and US-131, a federal, limited access, interstate highway. It is located adjacent to the easterly boundary of the City of Cadillac and along the northerly boundary of Clam Lake Township. State highway M-55 traverses the common boundary between Clam Lake Township to its south and the Charter Township of Haring to its north.
2. The City of Cadillac has public services, i.e., water and sanitary sewer services, within one-quarter of a mile from the proposed annexation area. According to the documents filed, the request for annexation was initiated to facilitate an economic development project within the area to be annexed. The economic development project, however, cannot come to fruition without connection to public services, and the City of Cadillac is able to provide the needed services in the immediate future.
3. The 1984 PA 425 Conditional Transfer Agreement included the area of the proposed annexation, plus additional lands, in Clam Lake Township, east of and adjacent to the proposed annexation area. A copy of the 425 Agreement is included as Exhibit B. In the 425 Agreement, the Charter Township of Haring indicates that they can provide Clam Lake Township with the needed public services, i.e., water and sanitary sewer services; however, their nearest existing services are approximately 3 miles from the proposed area for annexation.
4. The portion of the proposed annexation area designated for an economic development project is currently zoned "Forest/Recreational" according to the current Wexford County Zoning Map and pursuant to the current "Wexford County Comprehensive Plan" dated May 19, 2004.
5. The portion of the proposed annexation area designated for an economic development project has been denied the required rezoning in 1998 by the Clam Lake Township Board of Commissioners and again in 2008 by a vote of the citizens of Clam Lake Township.
6. The Commission found that the 425 Agreement was invalid because it was not being used to promote economic development. Their determination was based on the following:

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Page 3

- a. No clearly defined economic development project is named.
- b. Clam Lake Township received no benefit from the agreement, i.e., there is no revenue sharing included.
- c. Copies of emails obtained by the petitioner through a Freedom of Information Act request and provided to the Commission between Clam Lake Township and the Charter Township of Haring discuss the 425 Agreement as a means to deny the Commission jurisdiction over the proposed annexation.
- d. Concern over the Charter Township of Haring's ability to effectively and economically provide the defined public services. No cost study was proven to analyze the differential of connecting the area to public services from the Charter Township of Haring versus connecting to services from the City of Cadillac.
- e. The timing of the 425 Agreement. The agreement was executed more than three months after the annexation request was filed.

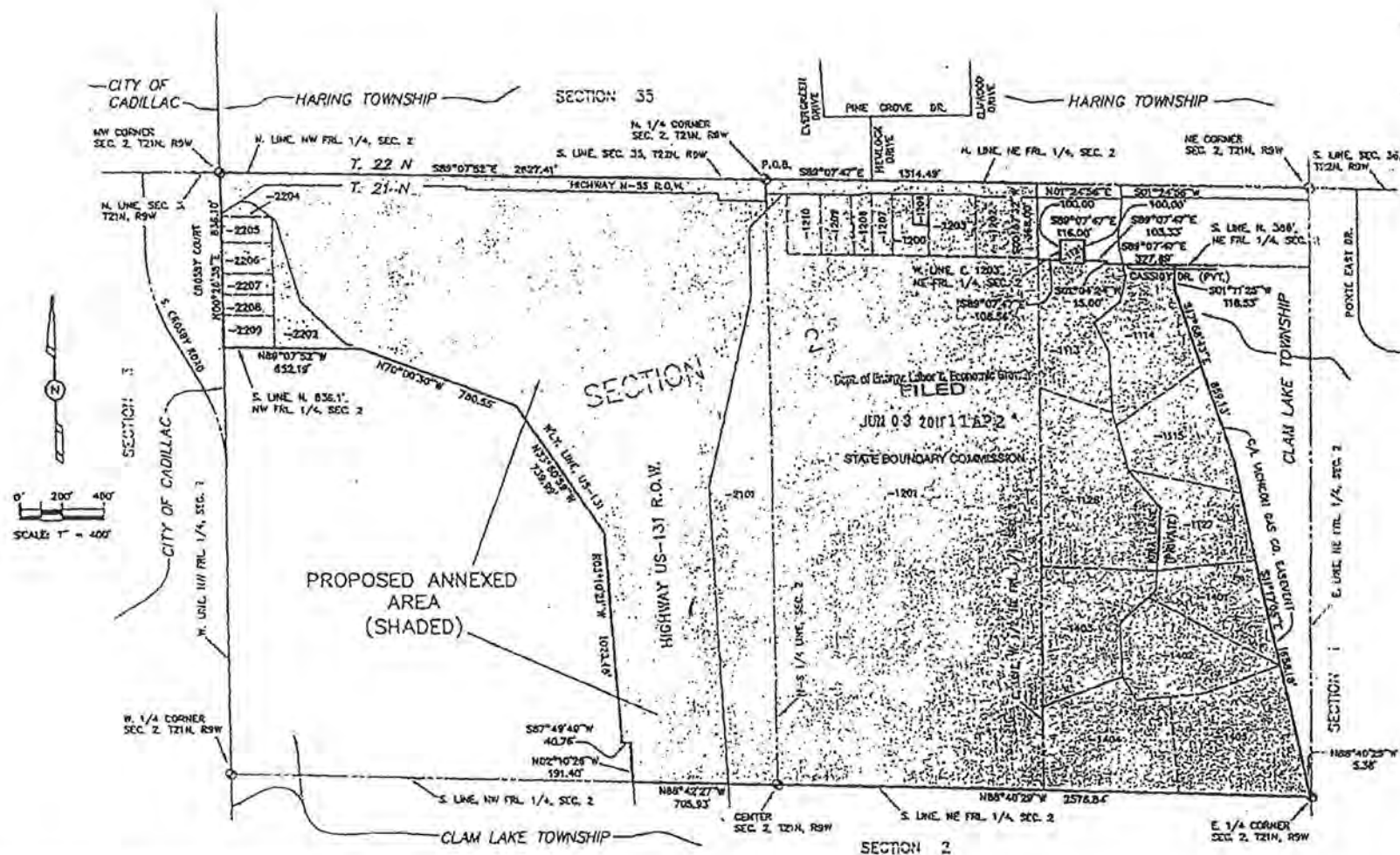
CONCLUSIONS OF LAW

1. The State Boundary Commission has considered the requirements in section 9 of 1968 PA 191, MCL 123.1009 and has come to the conclusion that these criteria support the majority vote of the Commission. The Commission recommends that in the case of Docket# 11-AP-2, Petition for Annexation of Territory in Clam Lake Township to the City of Cadillac, Wexford County, be denied by the Director of the Department of Licensing and Regulatory Affairs.
2. Pursuant to Executive Reorganization Order 1996-2, this denial is contingent on the concurrence of the Director of the Department of Licensing and Regulatory Affairs.


Dennis Schornack, Chairperson

8/8/12
Date

EXHIBIT A



| PROPERTY OWNED BY PETITIONER | |
|---|--------------------|
| PPN (PREFIX = 2109-02 FOR ALL PARCELS) | AREA |
| -1113, -1114, -1115, -1121, -1126, -1127, -1201, -1203, -1204, -1207, -1208, -1209, -1210, -1401, -1402, -1403, -1404, -1405, -2101, -2202, -2204 | 140.49 AC. |
| PROPERTY NOT OWNED BY PETITIONER | |
| PPN (PREFIX = 2109-02 FOR ALL PARCELS) | AREA |
| MOOT PARCELS | |
| -2101, -2202, -2204 | 15.98 AC. |
| R.O.W US-131 | 72.16 AC. |
| R.O.W M-55 | 8.27 AC. |
| OTHER PARCELS | |
| -1202, -1206, -2205, -2206, -2207, -2208, -2209 | 6.41 AC. |
| | 241.31 ACRES TOTAL |

PART I

CLAM LAKE TOWNSHIP
CITY OF CADILLAC
T.21 N. - R.9 W.
WEXFORD COUNTY, MICHIGAN

ANNEXATION PETITION BY OWNERS OF AT LEAST 75% OF THE LAND

PART III

The territory proposed for annexation to the City of Cadillac is legally described as follows:

Description of proposed Annexed Area:

Part of the NW fractional 1/4 and part of the NE fractional 1/4, Section 2, T21N, R9W, Clam Lake Township, Wexford County, Michigan, described as: Beginning at the N 1/4 corner of said Section 2; thence S89°07'47"E 1314.49 feet along the North line of said NE fractional 1/4; thence S00°57'32"W 368.00 feet along the East line of the West 1/2 of said NE fractional 1/4; thence S89°07'47"E 108.56 feet; thence N01°24'56"E 100.00 feet along the West line of the East 1203 feet of said NE fractional 1/4; thence S89°07'47"E 118.00 feet; thence S01°24'56"W 100.00 feet; thence S89°07'47"E 103.33 feet; thence S01°04'24"W 15.00 feet; thence S89°07'47"E 327.89 feet along the South line of the North 383 feet of said NE fractional 1/4; thence S01°11'25"W 118.53 feet to the centerline of a MichCon Gas line easement; thence S17°58'43"E 859.13 feet and S11°17'05"E 1658.18 feet along said centerline to a point on the South line of said NE fractional 1/4 which is N88°40'29"W 5.38 feet from the E 1/4 corner of said Section 2; thence N88°40'29"W 2576.84 feet along the South line of said NE fractional 1/4 to the center of Section 2; thence N88°42'27"W 705.93 feet along the South line of the NW fractional 1/4, Section 2 to the Westerly line of Highway US 131; thence N02°10'26"W 191.40 feet along said Westerly line; thence S87°49'49"W 40.76 feet and N03°10'21"W 1023.48 feet and N33°50'59"W 739.99 feet and N70°00'30"W 780.55 feet along said Westerly line to the South line of the North 836.1 feet of said NW fractional 1/4; thence N89°07'52"W 652.19 feet along said South line to the West line of said NW fractional 1/4; thence N00°28'38"E 836.10 feet along said West line to the NW corner of said Section 2; thence S89°07'52"E 2627.41 feet along the North line of said NW fractional 1/4 to the place of beginning.

Contains 241.31 acres.

Dept. of Energy, Labor & Economic Growth
FILED

JUN 03 2011 11 AP 2

STATE BOUNDARY COMMISSION

EXHIBIT B



STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

October 24, 2011

William Fahey
4151 Okemos Road
Okemos, MI 48864

RE: Conditional transfer of property

Dear Mr. Fahey:

This letter serves to acknowledge the Office of the Great Seal's receipt on October 20, 2011 of the filing of the conditional transfer of property pursuant to Public Act 425 of 1984 amended, from Clam Lake Township to the Haring Township. The receipt date is the effective date of this boundary change. This filing is designated as Job Number 11-412.

All property descriptions for any boundary changes are reviewed by the Michigan Department of Transportation (MDOT), and then published annually in the Michigan Public and Local Acts manual. If any property description is found inaccurate by MDOT, this office will contact you at that time and request a corrected description, which will not impact the effective date of the boundary change.

*****No further acknowledgment will be sent*****

Sincerely,

Michele Martin, Technician
Office of the Great Seal
517-241-1829

cc: Clam Township Clerk
Haring Township Clerk
Wexford County Clerk
Michigan Department of Labor and Economic Growth, State Boundary Commission
Michigan Department of Labor and Economic Growth, Liquor Control Commission
Michigan Department of Labor and Economic Growth, Office of Land Survey and Remonumentation
Michigan Department of Information Technology, Center for Geographic Information
Michigan Department of Treasury, Office of Revenue and Tax Analysis
Michigan Department of Transportation, Bureau of Transportation Planning
U.S. Bureau of the Census
Office of the Great Seal Job Number: 11-412

Job Number: 11-412

Townships
Wexford County

In the matter of the conditional transfer of certain property located in Clam Lake Township to Haring Township, Conditionally transferred in accordance with the provisions of Public Act 425 of 1984, as amended the following described property:

Beginning at the Northwest Corner of said Section 2; thence Easterly along the North line of said Section 2 to the North 1/4 Corner of said section; thence continuing Easterly along said North line of Section 2 to the Northeast Corner of said section; thence Easterly along the North line of said Section 1 to the Northeast Corner of said West 1/2 of the Northwest fractional 1/4 of Section 1; thence Southerly along the East line of said West 1/2 of the Northwest fractional 1/4 to the East - West 1/4 line of said Section 1; thence Westerly along said East - West 1/4 line to the 1/4 Corner common to said Sections 1 and 2; thence Westerly along the East - West 1/4 line of said Section 2 to the Center 1/4 Corner of said section; thence continuing Westerly along said East - West 1/4 line to the West right-of-way line of U.S. Highway 131; thence Northerly and Northwesterly along said right-of-way line to the South line of the North 836.10 feet of the Northwest fractional 1/4 of said Section 2; thence Westerly along said South line to the West line of said Section 2; thence Northerly along said West section line to the Point of Beginning.

AGREEMENT FOR CONDITIONAL TRANSFER

This Agreement is entered into by and between the Charter Township of Haring, a Michigan charter township, 515 Bell Avenue, Cadillac, Michigan 49601 (hereinafter referred to as "Haring") and the Township of Clam Lake, a Michigan general law township, 8809 East M-115, Cadillac, Michigan 49601-9786 (hereinafter referred to as "Clam Lake"), effective as of October 19, 2011.

WHEREAS, Haring and Clam Lake are local units as that term is defined by Public Act 425 of 1984, as amended, MCL 124.21, *et seq* ("Act 425"), and

WHEREAS, Haring is organized under the Charter Township Act, Public Act 359 of 1947, as amended, MCL 42.1, *et seq*, and

WHEREAS, Clam Lake is organized under Chapter 16, Revised Statutes of 1846, MCL 41.1, *et seq*, and

WHEREAS, properties within Haring and Clam Lake are currently used for residential, commercial and industrial purposes, or are proposed for future residential, commercial or industrial uses, and

WHEREAS, Haring and Clam Lake currently receive wastewater treatment services under agreements with the City of Cadillac (the "City"), but the City has announced that it will cease to provide wastewater treatment services to properties within Haring and Clam Lake after 2017, when the current wastewater treatment agreements with the City expire, and

WHEREAS, through litigation with the City, Haring has obtained the right to purchase an additional 121,000 gpd of wastewater treatment capacity in the City's wastewater treatment plant, and

WHEREAS, in anticipation of the cessation of City wastewater treatment service in 2017,

FILED WITH SECRETARY OF STATE

ON 10/20/2011 AT 2:57 PM

Haring is currently pursuing a number of options for future wastewater treatment, including, among others, pending litigation in the Michigan Supreme Court to extend the period during which it may continue to receive wastewater treatment service through the City's wastewater treatment plant, and the construction and operation of a new Haring wastewater treatment plant, and

WHEREAS, Haring and Clam Lake recognize that the existing and future wastewater needs of both townships will benefit from the townships' mutual cooperation, and

WHEREAS, the territory legally described in attached Exhibit A and depicted on the map attached as Exhibit B (hereinafter referred to as the "Transferred Area") is partially developed for residential housing and is proposed under the Wexford County Zoning Ordinance and Master Plan to be developed for additional residential housing, and

WHEREAS, the owners of the portion of the Transferred Area that has not yet developed for residential housing have suggested that they may need municipal wastewater treatment service in order to develop that property, and

WHEREAS, if the portion of the Transferred Area that has not yet been developed for residential housing does need municipal wastewater treatment service for some reason, Haring is currently in a better position than Clam Lake to provide that service, since Haring has a contract right to purchase additional wastewater treatment capacity from the City, and

WHEREAS, pursuant to Act 425, the Township Boards of Haring and Clam Lake held a joint public hearing on September 19, 2011, regarding this Agreement, notice of which was given in the manner required by law, and

WHEREAS, the Haring Charter Township Board and the Clam Lake Township Board have each decided, by majority vote of the members duly elected and serving on each respective body, to

enter into this Agreement and have authorized their respective representatives to execute this Agreement on their behalf.

NOW, THEREFORE, it is hereby agreed as follows:

ARTICLE I CONDITIONAL TRANSFER

1. Factors Considered.

Prior to the execution of this Agreement, Haring and Clam Lake have considered numerous factors including, but not limited to, the following:

- a. density and composition of population;
- b. land area and uses;
- c. topography and natural boundaries;
- d. assessed valuation;
- e. drainage and soil erosion;
- f. both proposed and possible future commercial and industrial development and growth;
- g. residential development and growth;
- h. the need for organized community services; the present cost and adequacy of governmental services, the future need of those services and the ability to provide those services;
- i. the practical effect of transferring property from one township to another including the impact on taxes and tax rates in relation to the benefits expected to accrue from the transfer;
- j. the general effect upon local units involved and the relationship of such an agreement to established city, village, township, county or regional land use plans.

2. Conditional Transfer of Property

The territory legally described in attached Exhibit A and depicted on the map attached as Exhibit B shall be known as the "Transferred Area." From the effective date of this Agreement until the Termination Date of the Conditional Transfer (the "Duration of the Conditional Transfer"), the Transferred Area shall be conditionally transferred for all purposes from the jurisdiction of Clam

Lake to the jurisdiction of Haring.

3. Economic Development Project

The Transferred area is currently used for existing residential housing, and is proposed for the development of additional residential housing as an economic development project under Act 425. In addition, this Agreement provides for wastewater infrastructure and services for the protection of the environment, including, but not limited to ground water or surface water, as an economic development project under Act 425.

4. Governmental Services and Authority

For the Duration of the Conditional Transfer, Haring shall provide the Transferred Area all municipal facilities and services afforded to property owners within Haring, to the extent that such services are available, and shall have the same local governmental authority within the Transferred Area as in the balance of Haring; provided, however, that wastewater and/or public water services shall be provided to the Transferred Area only if it is determined, in the discretion of the Haring Township Board, that such services are needed and can be reasonably and cost-effectively provided to the Transferred Area.

5. Ordinance Enforcement

For the Duration of the Conditional Transfer, the Transferred Area shall be subject to the enforcement of Haring ordinances, codes, rules and regulations in effect or subsequently amended.

6. Zoning and Building

The Transferred Area is currently zoned by Wexford County for residential use. The existing residential zoning of the Transferred Area shall remain in effect only until Haring can amend its zoning ordinance to incorporate the Transferred Area as designated for residential housing under the

Haring Township Zoning Ordinance. After such amendment, and for the Duration of the Conditional Transfer, the Transferred Area shall be subject to Haring's Zoning Ordinance and building codes as then in effect or as subsequently amended.

7. Assessing and Taxation

For the Duration of the Conditional Transfer, the Transferred Area shall be deemed to be within Haring's corporate limits and jurisdiction for all purposes of assessing and taxation, including but not limited to *ad valorem* real and personal property taxes, specific taxes, payments in lieu of taxes, and tax abatements, as provided by law.

8. Special Assessments

For the Duration of the Conditional Transfer, the Transferred Area shall be subject to Haring's jurisdiction for all purposes of special assessments. Clam Lake states and represents that there are no special assessment districts currently in place within the Transferred Area.

9. Charges for Governmental Services

For the Duration of the Conditional Transfer, the Transferred Area shall be subject to the same rates and charges for governmental services as provided to other properties within the jurisdiction of Haring.

10. Liens

For the Duration of the Conditional Transfer, all liens provided by Township Ordinance or State Law pertaining to the provision of services and the enforcement of special assessments and *ad valorem* real and personal property taxes shall have the same force and effect with respect to the Transferred Area as to other property within the corporate limits of Haring.

11. Voting

For the Duration of the Conditional Transfer, any qualified person residing within the Transferred Area shall be deemed to be qualified as an elector of Haring and shall be entitled to vote in all elections as a qualified elector of Haring.

12. Limitation on Annexation

For the Duration of the Conditional Transfer, the Transferred Area shall only be subject to the method of transfer included in this Agreement; no other method of annexation or transfer shall take place for any portion of the Transferred Area. In the event that any petitions for annexation are filed for any portion of the Transferred Area, Haring and Clam Lake agree to actively oppose such petitions by, at a minimum, stating their opposition in writing, requesting in writing that such petitions be dismissed and denied, and refraining from providing any direct or indirect assistance or support to the petitioners.

13. Taxes and Other Revenues

For the Duration of the Conditional Transfer, all taxes, revenue sharing and other revenues of any source or kind received by Haring due to or from the Transferred Area, or due to or from any activities conducted, use, occupation or population on the Transferred Area, shall be retained solely by Haring and shall not be shared with Clam Lake.

14. Duration of the Conditional Transfer

The Conditional Transfer shall be in effect only from the Effective Date of this Agreement until the Termination Date of the Conditional Transfer.

15. Effective Date

The Effective Date of this Agreement shall be the date first listed above.

16. Termination Date of the Conditional Transfer

The Conditional Transfer shall be terminated on the earliest date below;

- a. on the date that is ten (10) years after the Effective Date of this Agreement;
- b. on the date that is mutually agreed in writing by the parties;
- c. on the date that this Conditional Transfer is rejected in a referendum election of the residents of a local governmental unit that is party to this Agreement as permitted by Act 42S; or
- d. by operation of law should a tribunal of competent jurisdiction order the termination or invalidity of this Agreement.

17. Jurisdiction after Termination

- a. Immediately following the Duration of the Conditional Transfer, without any further agreement or writing, the Transferred Area shall automatically and permanently return to the jurisdiction of Clam Lake for all purposes, and thereafter shall no longer be within the jurisdiction of Haring for any purposes.
- b. If, during the Duration of the Conditional Transfer, Haring provides either public wastewater service or public water supply service to the Transferred Area, from a Haring public wastewater or public water supply system (each a "Utility System" and together, the "Utility Systems"), or both, then effective upon the Termination Date of the Conditional Transfer in accordance with Article I, Paragraph 16, Clam Lake agrees to enter into an intermunicipal agreement with Haring with respect to the services provided by Haring from either or both Utility Systems to the Transferred Area. This intermunicipal agreement shall contain mutually agreeable provisions, which, at minimum, shall: (1) provide for the consent by Clam Lake to the use of the public rights-

of-way in Clam Lake by Haring for purposes of the Utility Systems; (2) provide for the consent by Clam Lake to the installation, construction, extension, improvement, operation, maintenance, repair and replacement of all Utility System infrastructure by Haring within Clam Lake; (3) provide for the ownership of the Utility Systems by Haring; (4) provide appropriate provisions for the extension and improvement of the Utility System infrastructure which serves Clam Lake, whether such infrastructure is located within or without Clam Lake; (5) provide that Utility System customers located in Clam Lake shall pay to Haring fees, rates and charges for services rendered by the Utility Systems; (6) provide for the adoption by Clam Lake of Utility System ordinances providing for matters pertinent to the connection to, the use of and rates and charges payable with respect to the Utility Systems within Clam Lake, with such Clam Lake ordinances being (i) subject to the prior review and approval by Haring and (ii) not less restrictive than similar ordinances in effect in Haring; (7) provide for the billing and collection of Utility System fees, rates and charges to customers of the Utility Systems located in Clam Lake and appropriate provisions for the collection of delinquent fees, rates and charges; (8) provide for Clam Lake to place, in the manner provided by law, delinquent Utility System fees, rates and charges, upon certification by Haring, on the Clam Lake Township tax roll and, upon collection of the same, to pay the collected amounts to Haring; (9) provide for the adoption and implementation of appropriate notice and claim procedures provided by Act 222 of the Public Acts of Michigan of 2001, as amended; and (10) provide for insurance coverage with regard to the Utility Systems and the use thereof. Haring and Clam Lake agree that the term of such intermunicipal agreement shall, to the extent permitted by law, extend for a period of time that, at minimum, is co-extensive with the terms of the then outstanding bonded or contractual indebtedness of Haring which pertains to the Utility Systems which serve the Transferred

Area. Clam Lake agrees to provide all necessary assurances requested by Haring to satisfy requirements of Haring's lenders with regard to the Utility Systems, including entering into any required supplemental service agreements. If requested by Haring, separate intermunicipal agreements shall be negotiated for wastewater service and public water supply service. Haring and Clam Lake agree to negotiate the intermunicipal agreement(s) required by the terms of this paragraph in good faith and to commence such negotiations not less than six (6) months prior to the Termination Date of the Conditional Transfer.

ARTICLE II ENTIRE AGREEMENT

This Agreement constitutes the entire agreement of the parties and may not be modified or amended except by the written consent of the parties.

ARTICLE III GOVERNING LAW

This Agreement shall be construed in accordance with the laws of the State of Michigan. The parties hereby consent to the jurisdiction and venue in the Circuit Court for the County of Wexford with respect to all complaints, claims, demands, or other issues related to or arising from this Agreement. In the event of a dispute between the parties arising under this Agreement, this Agreement shall be enforced by either party in an action commenced in Wexford County, Michigan, and under Michigan law.

ARTICLE IV NON-ASSIGNMENT

No party to this Agreement shall assign any of its rights, duties or obligations hereunder without the written consent of all parties.

**ARTICLE V
SEVERABILITY**

In the event that any provision of this Agreement is held to be unenforceable for any reason, such holding shall not affect the viability and enforceability of the remainder of this Agreement.

**ARTICLE VI
FILING**

In accordance with Act 425, this Agreement shall be filed with the Wexford County Clerk and the Secretary of State Office of the Great Seal.

**ARTICLE VII
BINDING EFFECT**

This Agreement is binding upon the parties hereto, their successors and their assigns.

**ARTICLE VIII
NOTICES**

Any notice, demand, or communication required, permitted or desired to be given under this Agreement shall be deemed effectively given when personally delivered or mailed by first class or certified mail addressed to the then acting officials follows:

Township Supervisor
Charter Township of Haring
515 Bell Avenue
Cadillac, Michigan 49601

Township Supervisor
Clam Lake Township
8809 East M-115
Cadillac, Michigan 49601-9786

The parties may, by written notice, designate any further or different addresses to which subsequent notices, demands, or communications may be given.

ARTICLE IX MODIFICATION

No party to this Agreement may unilaterally modify this Agreement. There are no third party beneficiaries to this Agreement and none are intended.

ARTICLE X CONTINUING RESPONSIBILITIES FOR INDIVIDUAL LIABILITIES

Haring and Clam Lake shall each be responsible for such liabilities as may be incurred through their respective provision of governmental services and other performances of this Agreement and each shall respond to and provide for such liabilities on the same basis as Haring and Clam Lake do generally, except as set forth in Article XII of this Agreement.

ARTICLE XI EMPLOYEES

Haring shall be solely responsible for the manner of employing, engaging, compensating, transferring or discharging any employees, independent contractors or other personnel with respect to the governmental services Haring shall provide under this Agreement. Clam Lake shall be solely responsible for the manner of employing, engaging, compensating, transferring or discharging any employees, independent contractors or other personnel with respect to the governmental services Clam Lake shall provide under this Agreement.

ARTICLE XII REIMBURSEMENT AND INDEMNIFICATION

1. Clam Lake agrees to reimburse Haring for any and all costs and expenses, including without limitation actual attorney fees, which Haring incurs prior to execution of this Agreement for the Agreement's review, preparation, hearing and notice.
2. Clam Lake agrees to reimburse Haring for any and all costs and expenses, including

without limitation actual attorney fees, which Haring incurs to return jurisdiction of the Transferred Area to Clam Lake upon the termination of the Conditional Transfer under this Agreement.

3. Clam Lake agrees, to the extent permitted by law, to indemnify and hold harmless Haring from any and all claims for damages, costs, expenses, fees, liabilities and all other forms of monetary relief, whether legal or equitable in nature, arising in any way from the execution and implementation of this Agreement, including, without limitation, claims that might arise from the zoning or rezoning of the Transferred Area or the provision or the proposed provision of public sanitary sewer and/or public water supply service to the Transferred Area. Clam Lake further agrees to reimburse Haring for all costs, expenses and actual attorney fees Haring incurs, whether in administrative or judicial proceedings, involving the execution and implementation of this Agreement, including, without limitation, (a) proceedings before the State Boundary Commission involving the validity of this Agreement and/or annexation of the Transferred Area, (b) judicial proceedings involving the validity of this Agreement and/or annexation of the Transferred Area, or (c) administrative or judicial proceedings relating, in any way, to the zoning or rezoning of the Transferred Area. Haring may submit such reimbursable expenses, to the extent they are incurred, to Clam Lake on a monthly basis. Clam Lake shall pay Haring within 45 days following receipt of a written request for reimbursement from Haring. In the event that Clam Lake fails to indemnify and hold Haring harmless or fails to pay reimbursable expenses within the required 45 day period, Haring may commence an action in the Wexford County Circuit Court for recovery of the unpaid amount(s) and/or to otherwise enforce Clam Lake's indemnity/hold harmless obligations under this provision. If Haring prevails in such an action, whether in whole or in part, Clam Lake shall be required to pay Haring all costs, expenses and actual attorney fees Haring incurred in the action. The Haring

Township Board retains its right to select its own legal counsel to represent Haring in any and all of the foregoing matters, including, without limitation, proceedings that might arise from the zoning or rezoning of the Transferred Area. The obligations of this Article shall survive the termination of the Agreement and shall be binding on the parties, even if this Agreement is otherwise adjudged, whether in administrative or judicial proceedings, to be invalid for the purpose of satisfying the requirements of Act 425.

IN WITNESS WHEREOF the parties hereto have caused this instrument to be effective on the day and year first above written.

IN THE PRESENCE OF

Will K. Fahn
William K. Fahn
Maria L. Nixon
Maria L. Nixon
Will K. Fahn
Will K. Fahn
Maria L. Nixon
Maria L. Nixon

CHARTER TOWNSHIP OF HARING

By: Robert Scarbrough
Robert Scarbrough, Supervisor

By: Kirk Soule
Kirk Soule, Clerk

IN THE PRESENCE OF

Will K. Fahn
William K. Fahn
Maria L. Nixon
Maria L. Nixon
Will K. Fahn
Will K. Fahn
Maria L. Nixon
Maria L. Nixon

TOWNSHIP OF CLAM LAKE

By: Dale Rosser
Dale Rosser, Supervisor

By: Delores Peterson
Delores Peterson, Clerk

EXHIBIT A

LEGAL DESCRIPTION OF TRANSFERRED AREA

Part of the North fractional 1/2 of Section 2 and the West 1/2 of the Northwest fractional 1/4 of Section 1, Township 21 North, Range 9 West, Clam Lake Township, Wexford County, Michigan, more fully described as follows:

Beginning at the Northwest Corner of said Section 2; thence Easterly along the North line of said Section 2 to the North 1/4 Corner of said section; thence continuing Easterly along said North line of Section 2 to the Northeast Corner of said section; thence Easterly along the North line of said Section 1 to the Northeast Corner of said West 1/2 of the Northwest fractional 1/4 of Section 1; thence Southerly along the East line of said West 1/2 of the Northwest fractional 1/4 to the East - West 1/4 line of said Section 1; thence Westerly along said East - West 1/4 line to the 1/4 Corner common to said Sections 1 and 2; thence Westerly along the East - West 1/4 line of said Section 2 to the Center 1/4 Corner of said section; thence continuing Westerly along said East - West 1/4 line to the West right-of-way line of U.S. Highway 131; thence Northerly and Northwesterly along said right-of-way line to the South line of the North 836.10 feet of the Northwest fractional 1/4 of said Section 2; thence Westerly along said South line to the West line of said Section 2; thence Northerly along said West section line to the Point of Beginning.

EXHIBIT B

MAP OF TRANSFERRED AREA

TAB 3

Re: Last week's meeting

Page 1 of 2

From: dhrosser [REDACTED]
 To: "George Giftos" [REDACTED]
 Date: 09/14/2011 12:02:08 EDT
 Subject: Re: Last week's meeting

George,
 I think Bob is on board but I have found him difficult to read.
 It is an open meeting and I would appreciate it if you were there.
 Sept. 16 at 6:00 at the Haring Twp. offices.
 Thanks,
 Dale

On Wed, Sep 14, 2011 at 9:36 AM, George Giftos wrote:

Dale,

My only thought is that if you already have the cooperation of Bob Scarbrough, then it will probably pass. You are talking about a special meeting at 6PM on Thursday, 9/16? I agree that there's no reason to get a contingent of Haring TWP residents there for this, but I would like to attend.

George

On Sep 14, 2011, at 8:20 AM, dhrosser [REDACTED] wrote:

George,
 It looks like there will be a Special Meeting of the Haring Board tomorrow night at 6:00 PM. Clam Lake will be there to present our proposal for the 425 transfer of the subject property to Haring.

I find that this is a surprise to most of the board members in Haring so I expect there may be some consternation regarding the need for speed by Haring Township to act.

We have very tight timelines to meet to use this approach to avoid the possibility of the Boundary Commission making the decision on the development project.

We still need to hold a Public Hearing open to resident in both Clam Lake and Haring. Then we need to wait 30 days before the two Townships can formally act. We are trying to beat a review of the annexation application before the Boundary Commission on October 20.

I don't think it would be good to put excessive pressure on the Haring Board so I don't think a large contingent of residents should be there. Do you have any thoughts?

Dale

On Tue, Sep 13, 2011 at 12:31 PM, George Giftos wrote:

Dale,

Sounds good. If I can help, let me know.

George

On Sep 13, 2011, at 11:00 AM, dhrosser [REDACTED] wrote:

George,
 Sorry for taking so long to get back to you. The meeting went well, about 23 residents of Pointe East were in attendance and listened attentively to the Township Board's ideas.

George

On Sep 13, 2011, at 11:00 AM, ~~dhrosser~~ wrote:

George,

Sorry for taking so long to get back to you. The meeting went well, about 23 residents of Pointe East were in attendance and listened attentively to the Township Board's ideas.

At the end of the meeting all residents in attendance agreed that the idea of moving the TerriDee/Koetje property plus the Pointe East property to Haring Twp. through a 425 transfer makes sense.

At this point I am awaiting agreement from Haring officials to set up a Public Hearing to present this to residents of Clam Lake and Haring. A meeting has been scheduled between the Utilities Committee of Haring and our Defrns Committee for this Thursday. I hope to get a date set for the Public Hearing at that time.

Given our time constraints we may have to call the Public Hearing with very short notice and hold it jointly for both townships.

I may call on you to help get the word out of the Hearing if you don't mind.

I will be back in ouch after our Thursday meeting.

Thanks,
Dale

On Wed, Sep 7, 2011 at 12:26 PM, George Giftos wrote:

Dale,

Just wondering how you made out with the meeting last week?

George

RE: Public Notice

Page 1 of 1

From: "Kenneth Tacoma" <kennethtacoma@...>
 To: "George Giftos" <...>, carol.marcusse@..., mhudgins3@...,
 lluhane@..., "Cathy Tacoma" <...>, kim.schroeder@...,
 dhrosser@..., "Randy & Deb Heeres" <...>, dmackey@...,
 kirchk@..., mardic@...
 Date: 09/16/2011 09:23:36 EDT
 Subject: RE: Public Notice

Friends,

I will prepare a flyer for distribution to the Pointe East residents similar to the one for the earlier meeting if there are volunteers to help distribute it. Due to longstanding plans, Cathy is visiting our daughter in Chicago this weekend, so I'm shortstaffed :) , but I can get the flyer together tonight. Last time, Carol, Larry and Marlene made sure that all six circles were covered (Thank you very much!!) and we had a pretty good turnout, so I'll be calling you guys first (Marlene, I understand, is just back from the Mayo Clinic, so she may not be up to it). Anyway, I'll get it together if we can get it out, and George, if you want to get it spread in your sub, I can make copies for that too if you can get people to take them around.

Ken

> From: gcgiftos@utmi.net
 > Date: Thu, 15 Sep 2011 20:30:13 -0400
 > Subject: Public Notice
 > To: avancerealty@...; ridleyj@...; conradson5905@...;
 jwlrnce@...; carol.marcusse@...; mhudgins3@...; mardic@...;
 sandydeming@...; nden1@...; KennethTacoma@...; lluhane@...;
 cathytacoma@...; l_hubb@...; kim.schroeder@...; DHRosser@...;
 hkquinn@...; rdheeres@...; bjluce@...; mjc-h7@...;
 rmeyerling@...; dvoice47@...; cmwilson2@...; ramar@...;
 marybeth49601@...; dmackey@...; kirchk@...;
 MKLueder@...; kvav20@...; ameyervet@...; acolasacco@...;
 sheddman@...; pnswlger@...; edvokes@...; caroscar@...;
 rdcraig101@...; drenaud5229@...; mckeowns@...

> HI folks,

> It's my pleasure to inform you of a public notice which will appear in the Sat edition of the Cadillac News. There will be a joint meeting of the residents of Clam Lake TWP and the Charter TWP of Haring on Monday evening, 5:30PM at the Clam Lake TWP Hall. The purpose of the meeting is to inform and discuss the proposed 425 annexation of the property at the SE corner of the M55/131 bypass interchange, east to, and including the Pointe East Subdivision from Clam Lake TWP to the Charter TWP of Haring. This 425 annexation should put a halt to the State Boundary Commission's hearing on the annexation of the TerriDee/Koetje property to the City of Cadillac. We would like as many residents as possible on this list to attend.

> The decision to proceed with this 425 annexation was just approved at a special meeting of the Charter TWP of Haring Board this evening. Time is of the essence so we wish to proceed with plans as quickly as possible.

> See you there,

> George Giftos

From: "Kenneth Tacoma" [REDACTED]
To: dhrosser [REDACTED]
Cc: "George Giftos" [REDACTED], "George Giftos" [REDACTED], "Cathy Tacoma" <cathytacoma@ [REDACTED]>
Date: 09/20/2011 09:14:16 EDT
Subject: Notice to Pointe East residents
Attachments: [Pointe EastNoticeDon'tSign.docx \(44KB\)](#)

Dale,

Nice job at the meeting last night. However, I think a lot of people are confused about this. I would like to distribute the attached notice to all Pointe East homes, but don't want to do it without checking with you first. What do you think? If you give the OK, George will send it to his e-mail list and our Pointe East people will distribute it this weekend.

Ken

[http://enhanced.chadler.net/viewmessage?r=0%3Crequest%3D%3Cmail%3Daction%3D%3D](http://enhanced.chadler.net/viewmessage?r=0%3Crequest%3D%3Cmail%3Daction%3D%3D%3D) 0/77/7011

TAB 4

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WEXFORD

TERIDEE LLC, a Michigan limited liability
company; THE JOHN F. KOETJE Trust, u/a/d
5/14/1987, as amended; and THE DELIA
KOETJE TRUST, u/a/d 5/13/1987, as
amended,

Plaintiffs,

v

File No. 13-24803-CH

CLAM LAKE TOWNSHIP, a Michigan
municipal corporation; and HARING
CHARTER TOWNSHIP, a Michigan
municipal corporation,

Defendants.

OPINION AND ORDER ON MOTION FOR SUMMARY DISPOSITION

The defendants to this action, Clam Lake Township (Clam Lake) and Haring Charter Township (Haring) (collectively "townships") bring a motion for summary disposition as to Count II of the complaint brought against them by plaintiff, TeriDee LLC, The John F. Koetje Trust and the Delia Koetje Trust (TeriDee) asserting grounds based on MCR 2.116(C)(8) & (10). TeriDee requests summary disposition as to Count II based on MCR 2.116(I)(2) and MCR 2.116(C)(10).

The parties to this action have previously engaged in very similar litigation in case file 11-23576-CH which was filed on the 1st of November, 2011. (TeriDee #1). The TeriDee #1 action was dismissed by summary disposition based on the

determination that the State Boundary Commission (SBC) had primary jurisdiction. The TeriDee #1 case involved litigation by TeriDee against Haring and Clam Lake with respect to an Act 425 agreement between Haring and Clam Lake. Ultimately, the SBC considered the validity of the Act 425 agreement as it would effect the eligibility for TeriDee to be annexed to the City of Cadillac pursuant to authority granted to the SBC by MCL 123.1001 et seq. The SBC determined that the 2011 Act 425 agreement was invalid because the agreement "was not being used to promote economic development". The SBC did not approve the petition to annex the TeriDee property to the City of Cadillac. No appeal was taken pursuant to the Administrative Procedures Act, MCL 24.201 et seq.

In this pending action, in dismissed Count I, TeriDee requests declaratory relief that the Act 425 agreement between Haring and Clam Lake is invalid because it does not promote economic development but rather is intended to deprive the SBC of jurisdiction to process a petition for annexation of the subject property to the City of Cadillac. Count I is essentially identical to the claim that was brought in the TeriDee #1 litigation. Count II requests declaratory relief that the Act 425 agreement is invalid because the agreement is against public policy by contracting away Haring's legislative zoning powers with respect to the transferred property in violation of law. The townships assert that summary disposition should be granted based on the Doctrine of Primary Jurisdiction or based on the failure to exhaust administrative remedies as to both Counts. The townships further assert that the agreement does not constitute a contracting away of legislative authority of Haring Township with respect to zoning contrary to Michigan law and that the motion should be granted on that basis as to

Count II. The motion resulted in an opinion, dated December 20, 2014, granting summary disposition as to Count I based on the Doctrine of Primary Jurisdiction. The defendants' request for summary disposition as to Count II based on the Doctrine of Primary Jurisdiction was denied. As to Count II, both parties' requests for summary disposition, based on the claim of illegal contract zoning, were denied because additional discovery was necessary. Discovery is complete and additional briefing and arguments have been presented. TeriDee's motion is granted.

New Facts

Since the Opinion and Order on Summary Disposition entered on December 20, 2013, several changes in the factual circumstances are worthy of consideration. On June 26, 2014, the Director of the Department of Licensing and Regulatory Affairs issued a Final Decision and Order permitting the annexation of the subject property to the City of Cadillac. That order confirms the Summary of Proceedings and the Findings of Facts and Conclusions of Law issued by the State Boundary Commission on June 11, 2014. The State Boundary Commission determined that the Act 425 Agreement was invalid because it was intended to block annexation and was not an agreement that would promote economic development as required by the Act. An appeal of that decision pursuant to the Administrative Procedures Act is pending. Various other changes have occurred as a result of (1) facts disclosed through discovery, (2) actions taken by the townships and (3) amendments to the pleadings filed by TeriDee.

At the time of the prior ruling, there had already been an amendment made to the Act 425 Agreement that incorporated modifications of the zoning requirements to

make them consistent with the zoning regulations for the planned unit development (PUD) provisions of the Haring Zoning Ordinance. Thereafter, a second amendment to the Act 425 Agreement was enacted by both the Haring and Clam Lake Boards. The principle relevant provisions of that amendment at Article 1, Section 6d are as follows:

"d. *Savings/Severability Clause.* If a court or administrative agency of competent jurisdiction finds that the zoning provisions of this Section 6 are invalid for reason of constituting an unlawful infringement or restriction upon Haring's legislative zoning authority, then Haring and Clam Lake agree as follows:

(i) Upon such a finding, Section 6 shall, automatically and without further action by the parties, be interpreted and applied as requiring only that Haring comply with Section 504(3) of the Michigan Zoning Enabling Act, MCL 125.3504(3), when Haring receives a request for approval of a mixed-used commercial/residential PUD on the undeveloped portion of the Transferred Area. The parties' intention is that Haring's compliance with said statute will promote the type of planned "economic development project" that is envisioned by Section 3 of this Agreement.

(ii) Such a finding shall not invalidate the other provisions of this Agreement, which shall remain binding and fully enforceable, in concert with Art. I, Section 6.d(i)."

The amendment to the Act 425 Agreement also amended Article 1, Section 3 which as follows:

"The Transferred Area is currently used, in part, for existing residential housing, and the balance is currently undeveloped. The Transferred Area is proposed for the implementation of an economic development project under Act 425, with said economic development project consisting of two aspects, as follows: (a) the construction of a mixed-use, commercial/residential development that is designed and constructed in accordance with principles of planned unit development and the recommendations of the *Cadillac Area Corridor Study* (September 1999), in order to balance the property owners' desire for commercial use with the need to protect the interests of surrounding residential property owners; and, (b) the provision of public wastewater services and public water supply services to the Transferred Area, so as to foster the new mixed-use, commercial/residential development and to provide for the protection of the environment, including, but not limited to, protection of ground water and surface water on and below the Transferred Area."

Both township boards also passed resolutions indicating their intentions that Haring would be able to exercise its independent authority with respect to zoning. The resolution for Clam Lake reads as follows:

"NOW, THEREFORE, BE IT HEREBY RESOLVED AS FOLLOWS:

1. "The Clam Lake Township Board hereby states and confirms that it was Clam Lake's original intent that Article I, Section 6 of the Act 425 Agreement should and shall be interpreted as giving Haring the independent legislative authority to determine the content of the zoning regulations that will apply to the Transferred Area.
2. "It is the intention of the Clam Lake Township Board to continue to interpret and apply Article I, Section 6 of the Amended Act 425 Agreement consistent with the interpretation stated in paragraph 1 above, so that Haring has independent legislative authority to determine the content of the zoning regulations that will apply to the Transferred Area."

A very similar resolution was passed by the Haring Board simply replacing the name of the township with Haring Township.

The townships further point out that Haring proceeded to further amend their mixed use PUD zoning regulations to incorporate reference to the corridor study.¹ The amendment to the zoning ordinance involved changing, and making less stringent, the requirements contained in the first amendment to the Act 425 Agreement. The townships emphasize that TeriDee was invited to give input to that amendment process and that their ideas were, at least in part, implemented. It is further pointed out that Clam Lake Township officials did not involve themselves, either in person or in writing, with recommendations or suggestions with respect to the last amendment to the zoning

¹ The corridor study was a study conducted by the two townships and the City of Cadillac to address zoning and appropriate growth needs in response to the new US 131 freeway which bypassed the commercial areas of both the townships and the City.

ordinance.

TeriDee has referred to a number of items that were obtained pursuant to discovery that bear on the issue of the intent of the parties. Particularly, TeriDee has pointed out the testimony from both townships' officials indicating that the purpose of the Act 425 Agreement was to establish growth in the area consistent with the terms and conditions of the zoning provisions contained in the Agreement and its amendment. Members of both boards have testified that the zoning provisions contained in the Act 425 Agreement are binding on Haring. Further, when questioned, the members of both boards did not indicate that the Agreement was enacted for the purpose of sharing utilities such as the extension of water and sewer services to the transferred area. Lastly, discovery revealed that a member of the Haring Township Planning Commission emailed to both township supervisors his thoughts in terms of avoiding annexation by having the townships enact a 425 Agreement that could be in place prior to an annexation petition being filed.

Since the previous ruling, a further factual change was the filing of an amended complaint by TeriDee. The amended complaint essentially incorporated new theories that the Agreement be declared illegal. One theory is that the Agreement requires the provision of sewer and water services for a period of 20 years. Another argument is that the Agreement requires the townships to enter into an interim municipal contract following the expiration of the Agreement. The last new theory is that the requirement of Haring to indemnify Clam Lake from certain liability results in an impermissible lending of municipal credit. These three additional allegations prompted the townships to file a second motion for summary disposition asserting that the new allegations are

without merit and should be dismissed.

Standard of Review

Standard for Summary Disposition

Motions for Summary Disposition pursuant to 2.116(C)(8) test the legal sufficiency of the complaint. *Dolan v Continental Airlines*, 454 Mich 373, 653 NW2d 23 (1997). All well pleaded factual allegations are accepted as true and construed in the light most favorable to the nonmovant. *Wade v Department of Corrections*, 439 Mich 158, 483 NW2d 26 (1992). A "(C)(8)" motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id* at 163. A mere statement of a pleaders conclusions, unsupported by allegations of fact will not suffice to state a cause of action. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 516 NW2d 498 (1994). When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

Motions under MCR 2.116(C)(10) test the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this section, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding a material fact, the moving party is entitled to judgment as a matter of law. Summary disposition is also appropriate under (C)(10) and may be granted when issues raised are merely those of contractual interpretation rather than a factual dispute. *Allstate*

Insurance Company v Freeman, 432 Mich 656, 443 NW2d 734 (1998).

Summary disposition is properly granted to the opposing party if it appears to the Court that the opposing party rather than the moving party is entitled to judgment. MCR 2.116(l)(2), *Sharper Image Corp. v Department of Treasury*, 216 Mich App 698, 550 NW2d 596 (1996).

Analysis

The previous Opinion with respect to both the townships' and TeriDee's arguments for summary disposition as to Count II adequately address some of the legal theories that apply. TeriDee now argues that two issues remain for consideration. The first issue being whether or not the Act 425 Agreement and its amendment constitute an improper delegation of legislative authority by Haring. Second, if the zoning provisions are void, can a severance of those provisions save the contract and still accomplish the appropriate objectives of an Act 425 Agreement. Discovery was premitted as to those issues, and the factual changes that have occurred since the prior ruling are outlined above. Further analysis is necessary.

In the original ruling, this Court addressed the issue of the legality of the Act 425 Agreement with respect to its delegation of legislative powers as follows:

"TeriDee's argument is essentially that the Act 425 agreement entered into between Haring and Clam Lake improperly delegates the legislative powers of Haring to Clam Lake by virtue of the contract terms and is in violation of the Michigan Zoning Enabling Act (MZEa). They assert that neither the language of Act 425 or the MZEa provides for any specific ability of one municipality to contract with another municipality with respect to specific zoning of a particular parcel which would be the subject of an Act 425 agreement. In the case of *Inverness v Bedford Township*, 263 Mich App 241, 687 NW2d 869 (2004), the Court of Appeals determined that a consent judgment, that provided that a municipality must rezone a parcel of property, if an application was made, constituted an inappropriate limitation on the legislative power of the future township boards and was, therefore, void. Here, the townships counter that the Act 425 agreement provides, at MCL 124.26(b), that the agreement may provide for "the adoption of ordinances and their enforcement by or with the assistance of the participating local units." Although the Act goes on to enumerate certain

areas in which a transfer of jurisdiction can be coupled with the requirement that certain ordinances be enforced, there is no provision that specific terms of an ordinance must be provided. The Act 425 agreement before this Court dictates that a certain Planned Unit Development (PUD) zoning provision be enacted by Haring Township and be made applicable to the subject property. The townships argument that Act 425 allows such a zoning provision or that it is allowed by MZEA is unavailing.

Next, the townships argue that the agreement itself does not provide for a specific zoning of the property but only provides that such zoning shall be approved if the property owner makes application for PUD zoning as provided in the Act 425 agreement. Therefore, the townships argue, there is not a mandatory requirement that Haring Township zone the property but that it is contingent upon the application by the property owner. TeriDee counters that such a requirement still constitutes a binding contract on Haring, and the fact that it is contingent upon the property owners application does not change the impropriety of that provision. In the *City of Hazel Park v Potter, supra*, it was determined that a contract that also authorized further modification did not avoid the impropriety of contracting away legislative authority. Further, *Inverness, supra*, clearly established that such a contingency does not cure the impropriety of contracting away such legislative authority."

It is necessary now to address the issue of whether or not the additional facts obtained through discovery change the the legality of the Act 425 Agreement based on the precedent listed above. The townships would argue the fact that Haring has now again amended the Act 425 Agreement, and that it has been "accepted" by Clam Lake, indicates that Haring has not contracted away its ability to exercise legislative authority. Such an analysis completely misses the point of the ability of Claim Lake to enforce the terms and conditions of the restrictive PUD requirements contained in the amended Act 425 Agreement. If a subsequent Haring Board, or zoning administrator, approves a development of the property in a less restrictive fashion than contained in the amended Act 425 Agreement, Clam Lake Township would have the authority under the Agreement to seek judicial intervention to block such development. The language of the Act 425 Agreement that contains the more stringent conditions is found in Art. I, 6,

a, 2 as follows:

"The balance of the Transferred Area that is currently undeveloped shall be rezoned, upon application of the property owners(s), to a planned unit development ("PUD") district that permits mixed commercial/residential use; provided, however, that Haring shall not consider a PUD rezoning application for this portion of the Transferred Area until (i) it has adopted provisions in its zoning ordinance that allow mixed-use commercial/residential PUDs, and which require that such PUDs comply with the following minimum requirements, and (ii) the property owner(s) have submitted an application that complies with the following minimum requirements;"

Further on in the same subsection of the Agreement at subparagraph V, the following provision appears:

"V. Other

The PUD plan shall be reviewed in accordance with, and shall otherwise comply with, the PUD regulations of the Haring Township Zoning Ordinance, to the extent that those regulations are not inconsistent with the above minimum requirements. Where the above regulations are more stringent, the more stringent regulations shall apply."

It is also noted that Art. I, 6, c provides as follows:

"After such amendments to the Haring zoning ordinance, and for the Duration of the Conditional Transfer, the Transferred Area shall be subject to Haring's Zoning Ordinance and building codes as then in effect or as subsequently amended."

In order to evaluate the above contractual language, a review of rules of contractual interpretation is appropriate.

A contract must be construed as a whole, so as to give each of its provisions the meaning intended by the parties. *Leon v Detroit Harvester Company*, 363 Mich 366, 109 NW2d 804 (1961). By reading each provision of the contract in the context of the whole, ambiguity may be avoided. *Arrow Sheet Metal Works, Inc. v Bryant & Detwiler Company*, 338 Mich 68, 61 NW2d 125 (1953). The goal must be to harmonize the

contract as a whole by giving effect to each contractual clause. *Murphy v Sed-Roberts Agency, Inc.*, 79 Mich App 1, 261 NW2d 198 (1977). In construing contracts, the Court may give effect to every word or phrase as far as practicable and avoid any interpretation that would render any part of the contract surplusage or nugatory. *Klapp v United Insurance Group Agency, Inc.* 468 Mich 459, 663 NW2d 447 (2203). In construing a contract, the Court must adopt the construction that will result in a reasonable, fair, and just contract as opposed to one that is unusual or extraordinary or produces unfair or unreasonable results. *Port Huron Area School District v Port Huron Education Association*, 120 Mich App 112, 327 NW2d 413 (1982). Typically, specific contractual provisions will override general provisions in the contract. *Royal Property Group LLC v Prime Insurance Syndicate Inc.*, 267 Mich App 708; 706 NW2d 426 (2005).

The townships argue that subsequent actions taken by Haring to amend the zoning provisions proves that Haring is not contractually bound in its exercise of legislative authority with respect to zoning. An amendment was made to the requirements of the PUD that provided for less restrictive provisions than contained in the original Act 425 Agreement and its amendment. The townships point out that in the legislative process of making those amendments, no input whatsoever was received from Clam Lake, but that decision was independently made by Haring. Further, they point out that TeriDee did provide input on amendments to the PUD requirements, and that a majority of those suggestions were incorporated into the amended provisions. However, Art. I, 6, a, 2 specifically provides for approval of development of the

transferred area only upon "an application that complies with the following minimum requirements:". The minimum requirements then comprised the next 10 pages of the Act 425 Agreement. The amendments to the minimum requirements that are contained in the first amendment to the Act 425 Agreement are equally substantial in length and detail, but simply less stringent. It is further worthy of note that subsection V at page 17 of the original Agreement provides that "where the above regulations are more stringent, the more stringent regulations shall apply". The terms and conditions of the PUD Agreement require that the more stringent zoning requirements shall apply to any approval by Haring for development of the transferred area.

The townships further argue that the provisions of the Act 425 Agreement provide for amendment of their zoning ordinance after initially adopting PUD zoning requirements consistent with the Agreement. Therefore, they argue that after an initial adoption of those requirements, they may be amended at Haring's will. Such an interpretation clearly avoids the underlying content of the entire contract. As noted above, the contract should be read as a whole and reading the contract as a whole requires that the detailed specific requirements for PUD development must be given meaning. To simply permit them to be amended unilaterally thereafter, and one can presume immediately thereafter, would give no meaning whatsoever to approximately 10 pages of the Agreement that contains detailed zoning provisions. Those more specific terms for the zoning requirements must prevail over the more general term "as amended." *Royal Property Group LLC, supra*.

The discovery that was conducted since the Court's last Opinion clearly reveals that the members of both township boards considered the zoning provisions to be

essential to their agreement. The provision of water and sewer services was only ancillary to that and necessary in order to complete the development with the more stringent requirements. No discovery or subsequent actions taken by the townships reveal that the parties did not consider the zoning provisions to be central to the underlying agreement of the townships.

The townships further argue that their similar resolutions declaring their intent with respect to the meaning of the Agreement avoids the argument that it is contract zoning. As is pointed out by TeriDee, the intent of the parties does not become relevant unless there is an ambiguity in the underlying contract. *Burkhardt v Bailey*, 260 Mich App 636, 680 NW2nd 453 (2004). Here, the plain language of the Act 425 Agreement provides for specific terms of zoning to apply to the transferred area. No ambiguity exists, and it is doubtful that any parole evidence, such as the resolutions passed by the townships, should be considered in interpreting the contract if enforcement were to take place in the future. Further, it simply begs the question that the townships will pass a resolution indicating what their intentions are with respect to the nature of a contract, but not amend the contract to reflect those intentions. The townships have demonstrated their ability to amend the Act 425 Agreement to modify the minimum requirements for the PUD zoning that would apply to the transferred property. Should their intention really be that Haring remains exclusively in control of zoning, they could amend the Act 425 Agreement and completely eliminate the zoning requirements contained therein. They have failed to do so, and that inaction clearly shows that the townships' intent to have the restrictions with respect to zoning apply to any approval of development of the transferred property.

As a result of the above, the contract is an improper delegation of legislative authority by the Haring board by way of contract zoning. The same constitutes a violation of public policy and law and makes the contract void. *City of Hazel Park v Potter, supra; Inverness v Bedford Township, supra.*

The next consideration is whether or not the townships' argument that the illegal provisions can be severed from the Agreement and the remainder of the Agreement will remain viable. Teridee properly points to authority which holds for the proposition that if an illegal portion of the contract is severed, but is essential to the contract, the entire contract is void. In the case of *AFSCME v Detroit*, 267 Mich App 255, 272-273; 704 NW2d 712 (2005), citing to the case of *Stokes v Millen Roofing Company*, 466 Mich 660, 666; 649 NW2d 371 (2002), the holding is as follows:

"However, in order to sever "the illegal portion, the illegal provision must not be central to the parties' agreement." *Id.* "If the agreements are interdependent and the parties would not have entered into one in the absence of the other, the contract will be regarded . . . as entire and not divisible." *Id.*, quoting 3 Williston, Contracts (3d ed), § 532, p 765."

Severing the zoning provisions leaves the agreement with very little to offer. As conceded by the parties, the development of the transferred area will only occur if the cost of such development is born by a developer/property owner. The obligation of Haring to provide water and waste water services to the transferred area is contingent upon obtaining a developer willing to advance those costs for the extension. With the zoning provisions severed from the Agreement, Haring would be at liberty to modify its PUD Zoning Ordinance or even eliminate such a PUD zoning provision in its zoning and afford no opportunity for the property to be developed in any fashion. The discovery

from the townships' board members reveals that the development of the property consistent with the zoning provisions was central to the contract. The other provision of the Agreement, that provides for possible future extensions of waste water treatment services to the Clam Lake DDA, is contingent on providing waste water treatment services to the transferred area. Severing the zoning provisions of the Agreement, and thereby making development unilaterally within the control of Haring, makes the provisions for the further extension of the waste water treatment services illusory. *Mastaw v Naiukow*, 105 Mich App 25, 306 NW2d 378 (1991). Those illusory provisions with respect to extension of water and waste water treatment services do not support a valid contract if the zoning provisions are severed.

It is further of note that to sever the provisions with respect to the zoning requirements is fatal to the agreements compliance with the requirements of Act 425. The ability of Haring Township to simply zone the property to avoid any economic development is fatal to compliance with the Act. As a result of the above, the Act 425 Agreement as amended must be declared void.

Lastly, turning to the defendant's second motion for summary disposition that the contract should be voided because of other illegal provisions. One theory was that the Agreement should be voided as contracting away the townships' legislative authority because it encumbers the future boards for a period of 20 years with respect to the provision of sewer and water services. Another argument contained in the amended complaint is that the townships are required to enter into an interim municipal contract following the expiration of the Agreement which would also improperly contract legislative authority. The third argument is that the requirement that Haring is to

indemnify Clam Lake for certain liabilities is an impermissible lending of municipal credit. In light of the determination that the contract is void as a result of the illegal zoning provisions, those issues have become moot. As noted by the townships in the case of *Contesti v Attorney General*, 164 Mich App 271, 278; 416 NW2d 410 (1987) "As a general rule our courts will not entertain moot issues or decide moot cases." Here, because of the decision making the contract void, the above issues are moot. However, in light of potential appellate review of this decision, it should further be noted that this Court determines that those provisions in the contract can easily be severed if they are considered to be illegal or against public policy. As noted above, there is a severability provision contained in the amended Act 425 Agreement that could apply to those provisions. Those provisions of the Agreement may have to be re-addressed to determine if they are central to the Agreement should this ruling on summary disposition be overturned.

ORDER

IT IS HEREBY ORDERED that plaintiffs' motion for summary disposition pursuant to MCR 2.116(I)(2) and MCR 2.116(C)(10) is granted ; the Act 425 Agreement is void.

Dated: September 19, 2014


WILLIAM M. FAGERMAN P27271
Circuit Judge

TAB 5

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
STATE BOUNDARY COMMISSION

In the matter of:

State Boundary Commission
Docket #13-AP-2

The proposed annexation of land
in Clam Lake Township to the City of Cadillac,
Wexford County.

**SUMMARY OF PROCEEDINGS,
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

SUMMARY OF PROCEEDINGS

1. On June 5, 2013, a petition was filed with the State Boundary Commission by TeriDee, L.L.C. requesting the annexation of land in Clam Lake Township to the City of Cadillac. This is the same area that was previously denied by the Commission in Docket #11-AP-2. The map and legal description of the area proposed for annexation are included as **Exhibit A**.
2. On June 10, 2013, under the authority of 1984 PA 425, Intergovernmental Conditional Transfer of Property by Contract, a 425 Conditional Transfer between the Charter Township of Haring and the Township of Clam Lake, was filed with the Michigan Secretary of State. The 425 Conditional Transfer includes the area of the proposed annexation as well as other lands to the east also in Clam Lake Township. This agreement was approved by the respective governmental bodies at a joint meeting on May 8, 2013 and is included as **Exhibit B**.
3. On August 13, 2013, the State Boundary Commission found by a vote of 5-0 that the annexation petition was legally sufficient and scheduled a public hearing to be held on October 23, 2013.
4. On October 21, 2013, the "First Amendment to Agreement for Conditional Transfer" between the Charter Township of Haring and the Township of Clam Lake was filed with the Michigan Secretary of State. This amendment revised the conditions of the 425 Conditional Transfer referenced in Item 2 above. This amendment is included as **Exhibit B-1**.

5. On October 23, 2013, the Commission held a public hearing at the Cadillac City Hall. At the meeting, the Commission heard comment from the involved parties and the public on the merits of the proposed annexation and the 425 Conditional Transfer. Following the hearing, a 30-day public comment period was opened and expired on November 21, 2013. Following the 30-day public comment period, a 7-day rebuttal period opened December 9, 2013 and expired on December 16, 2013. The petitioner, TeriDee, L.L.C., the City of Cadillac and both the Charter Township of Haring and Clam Lake Township filed additional information with the Commission after December 16, 2013.
6. On March 14, 2014, a "Second Amendment to Agreement for Conditional Transfer" between the Charter Township of Haring and the Township of Clam Lake was filed with the Michigan Secretary of State. This amendment revised the conditions of the "First Amendment to Agreement for Conditional Transfer" referenced in Item 4 above. This amendment is included as **Exhibit B-2**.
7. On April 16, 2014, the State Boundary Commission voted 4-1 to recommend to the Director of the Department of Licensing and Regulatory Affairs that he find the 425 Conditional Transfer between the Charter Township of Haring and Clam Lake Township invalid. The Commission believes that the 425 Conditional Transfer was created solely as a means to bar the annexation and not as a means of promoting economic development.
8. On April 16, 2014, the State Boundary Commission voted 4-1 to recommend to the Director of the Department of Licensing and Regulatory Affairs that he approve the petition for annexation.
9. On June 11, 2014, the Commission voted unanimously to approve the meeting minutes for the April 16, 2014 meeting reflecting the Commissioners decisions on this case, and the draft Summary of Proceedings, Findings of Fact, and Conclusions of Law recommending that the Director of the Department of Licensing and Regulatory Affairs sign an order approving the proposed annexation of land in Clam Lake Township to the City of Cadillac. The approved meeting minutes are included as **Exhibit C**.

FINDINGS OF FACT

1. The proposed area for annexation is located at the interchange of state highway M-55 and US-131, a federal limited access, interstate highway. It is located adjacent to the easterly boundary of the City of Cadillac and along the northerly boundary of Clam Lake Township. State highway M-55 traverses the common boundary between Clam Lake Township to its south and the Charter Township of Haring to its north.
2. The City of Cadillac has public services, i.e., water and sanitary sewer services, near the proposed annexation area. According to the petition, the request for annexation was initiated to facilitate an economic development project within the area to be annexed. The economic development project, however, requires connection to public services, such as

public water and public sanitary sewer services, and the City of Cadillac is able to provide the needed services in the immediate future.

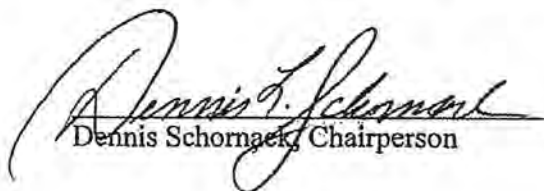
3. The 1984 PA 425 Conditional Transfer included the area of the proposed annexation, plus additional lands, in Clam Lake Township, east of and adjacent to the proposed annexation area. A copy of the original 425 Conditional Transfer and the two amendments to this agreement are included as Exhibits B, B-1 and B-2. In the 425 Conditional Transfer, the Charter Township of Haring indicates that they can provide Clam Lake Township with the needed public services, i.e., water and sanitary sewer services; however, their nearest existing services are approximately 2 miles from the proposed area for annexation. Clam Lake Township can only supply these services via a contract with the Charter Township of Haring that would require an estimated \$1 to 2 million dollars in additional construction costs than if connecting to the infrastructure available from the City of Cadillac. The 425 Conditional Transfer also required a mixed-use development of residential and commercial properties with specific zoning requirements for the development.
4. The portion of the proposed annexation area designated for an economic development project is currently zoned "Forest/Recreational" according to the current Wexford County Zoning Map and "Wexford County Comprehensive Plan".
5. The portion of the proposed annexation area designated for an economic development project was the subject of a proposed 425 Conditional Transfer between the City of Cadillac and Clam Lake Township that was rejected by the voters of Clam Lake Township in 2008.
6. The Commission found that the 425 Conditional Transfer was invalid because it was not being used to promote economic development. Their determination was based on the following:
 - a. The economic development project that is allowed by the 425 Conditional Transfer is not believed by the Commission to be viable. The developer, and majority owner of the land encompassed, was not involved in the development of, or contacted for input on, the 425 Conditional Transfer before it was signed by the Townships.
 - b. Clam Lake Township received no benefit from the agreement, i.e., there is no revenue sharing included. The Charter Township of Haring would receive all tax revenue.
 - c. Copies of email correspondence between Clam Lake and Haring Township officials and area residents were obtained by the petitioner and provided to the Commission. These emails discuss the 425 Conditional Transfer as a means to deny the Commission jurisdiction over the proposed annexation and prevent development of the area. See **Exhibit D**.
 - d. The Charter Township of Haring's ability to effectively and economically provide the defined public services including adequate water pressure in the event of a fire.

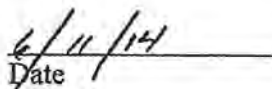
- e. The timing of the 425 Conditional Transfer.
 - i. The development of the agreement was not initiated until after the Townships learned that an annexation request was going to be filed.
 - 1. On Monday, April 15, 2013 an email from George Giftos, member of the Haring Township Planning Commission, to Clam Lake and Haring Township officials and area residents discussing the 425 Conditional Transfer as a means to deny the Commission jurisdiction over the proposed annexation and prevent the development of the area. (See Exhibit D.) This email:
 - a. Mentions the rumor that TeriDee, L.L.C will file an annexation petition with the State Boundary Commission on June 4.
 - b. Opines that "the reason that the 425 agreement with Haring Twp. was thrown out by the State Boundary Commission was that it was deemed to be a ploy and had been filed AFTER the filing by Terri-Dee (sic) for annexation. If we were to pursue this again and got it done BEFORE June 4, that argument would no longer apply."
 - c. Further states, "Clam Lake Twp. is planning on meeting with their attorney to investigate what other options may be available to them in a closed session Wednesday night. Haring Twp. will have a special meeting at 3pm tomorrow (Tuesday)."
 - 2. On May 8, 2013, the 425 Conditional Transfer was the subject of a public hearing and was approved by both Townships at a special joint meeting on the same night.
- 7. The Commission found the following to support its recommendation to approve the annexation petition based on the criteria specified in Section 9 of the State Boundary Commission Act [1968 PA 191, MCL 123.1009]:
 - a. *Need for community services; the probable future needs for services; the probable effect of the proposed incorporation and of alternative courses of action on the cost and adequacy of services in the area.*
 - i. The economic development project planned by the petitioners requires connection to public water and sanitary sewer services in order to be constructed. These services are available immediately from the City of Cadillac. It is unknown when these services would be available from the Charter Township of Haring.

- b. *The present cost and adequacy of governmental services in the area;*
 - i. Clam Lake Township can only supply public water and sewer services via a 425 Conditional Transfer with the Charter Township of Haring that would require an estimated \$1-2 million dollars in additional construction costs than the infrastructure available from the City of Cadillac. The infrastructure is immediately available from the City of Cadillac. It is unknown when these services would be available from the Charter Township of Haring.
 - c. *The practicability of supplying such services in the area;*
 - i. The infrastructure connection from the Charter Township of Haring is dependent on a number of factors, including local governmental action, procurement of easements, construction of additional pumping stations and the completion of the Haring Township Wastewater Treatment Plant. The timeframe to receive these services from the Charter Township of Haring is unknown, while the services available from the City of Cadillac can be accessed immediately.
 - d. *The past and probable future growth, including increase and business, commercial and industrial development in the area.*
 - i. The economic development project planned by the petitioners will create new jobs in the area during construction and after it is built out.
8. A copy of the approved minutes from the State Boundary Commission's April 16th, 2014 meeting is included as **Exhibit C**.

CONCLUSIONS OF LAW

1. The State Boundary Commission has considered the requirements in section 9 of 1968 PA 191, MCL 123.1009 and has come to the conclusion that these criteria support the majority vote of the Commission. The Commission recommends that in the case of Docket# 13-AP-2, Petition for Annexation of Territory in Clam Lake Township to the City of Cadillac, Wexford County, be approved by the Director of the Department of Licensing and Regulatory Affairs.
2. Pursuant to Executive Reorganization Order 1996-2, this denial is contingent on the concurrence of the Director of the Department of Licensing and Regulatory Affairs.


Dennis Schornack, Chairperson


Date 6/11/14